15-8-312

RECORD, CASE No. 14,850.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~1576.~~ 933 633 295

THE TOWN OF ANDES, PLAINTIFF IN ERROR,

vs.

DUDLEY P. ELY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 21, 1891.

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1 *Summons.*

United States Circuit Court for the Northern District of New York.

DUDLEY P. ELY, Plaintiff,
against
THE TOWN OF ANDES, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of Supreme Court of the United States, at the city of Utica, this [L. S.] 27th day of December, in the year one thousand eight hundred and eighty-nine.

W. S. DOOLITTLE, *Clerk.*

JOHN B. GLEASON,
Plaintiff's Attorney.

Office and post-office address, 115 Broadway, New York, New York.

(Indorsed:) No. 2937. U. S. circuit court, northern district of New York. Dudley P. Ely *vs.* The Town of Andes. Summons. John B. Gleason, plaintiff's attorney. Filed Dec. 31, 1890. W. S. Doolittle, clerk.

2 *Complaint.*

United States Circuit Court, Northern District of New York.

DUDLEY P. ELY, Plaintiff,
against
THE TOWN OF ANDES, Defendant.

The plaintiff complains of the defendant and alleges, upon information and belief—

I. That the plaintiff is a citizen of the State of Connecticut, resides at South Norwalk, Connecticut, and that the town of Andes is and for the thirty years last past has been one of the towns of the county of Delaware, in the State of New York, and a municipal corporation duly organized under the statutes of the State of New York.

II. That on the second day of April, 1850, the legislature of the State of New York passed an act, which became a law, entitled "Chapter 140 of the Laws of the State of New York for the year 1850, an act to authorize the formation of railroad corporations and to regulate the same," and that on the 18th day of May, 1869, the said legislature passed an act, which became a law, amending said

act and entitled "Chapter 907 of the Laws of the State of New York for the year 1869, and an act to amend an act entitled An act to authorize the formation of railroad corporations and to regu-
3 late the same, passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads," and that these acts were further amended by Chapter 507 of the Laws of the State of New York for 1870 and by Chapter 925 of the Laws of the State of New York for 1871, and to the said acts and to all amendments of the same plaintiff prays leave to refer as if part of this complaint with the like effect as if the same were fully set out herein.

III. That the first-mentioned act in substance authorized the formation of railroad corporations and provided for the regulation of the same, and that the said secondly-mentioned act in substance authorized and empowered the defendant to create and issue its bonds through commissioners to be appointed for the purpose and to invest the same, and to subscribe to the stock of any railroad company formed in pursuance of said acts, and authorized the defendant to subscribe to the stock of the Delhi and Middletown Railroad Company, a railroad corporation of the State of New York, and to issue its bonds in payment therefor.

IV. That by the said act of 1869 the county judge of Delaware county was constituted a tribunal to determine whether a majority of the tax-payers and taxable property of the town of Andes had consented to the bonding of said town; and it was further provided by said act that if he should so determine, then he should appoint three commissioners to issue the said bonds and to carry out the purposes of the act; and that upon the 22d day of May, 1871,
4 Edwin D. Wagner, being the county judge of Delaware county and having full jurisdiction in the premises, duly rendered an adjudication, of which the following is a copy:

"In the matter of the petition of a majority of the tax-payers of the town of Andes, representing a majority of the taxable property in the limits of said town, on an application to the county judge of Delaware county to create & issue its bonds to the amount of ninety-eight thousand dollars.

Whereas a majority of the tax-payers of the town of Andes, in the county of Delaware, representing a majority of the taxable property in the limits of said town, made application to me by a petition, verified by one of the petitioners, setting forth that they were such a majority of tax-payers & represent such a majority of taxable property, & that they desired that such town create & issue its bonds to the amount of ninety-eight thousand dollars; and whereas on the 6th day of May, 1871, I issued an order that a notice be published in the Andes Recorder, a newspaper published in said town of Andes, setting forth that on the 22d day of May, 1871, I would proceed to take proof of the facts set forth in said petition as to the number of tax-payers joining in such petition & as to the taxable property represented by them; & whereas due proof having been made before me of the due publication of said notice more

than ten days previous to this date; & whereas due proof as to the said allegations in said petition having been made before me, & it appearing satisfactor-y to me that the said petitioners do rep-
5 resent a majority of the tax-payers of said town of Andes, as shown by the last preceding tax-list or assessment-roll, & do represent a majority of the taxable property upon said list or roll, on motion of White & Jacobs, att'ys for petitioners, I do hereby adjudge & determine that said petitioners do represent a majority of the tax-payers of said town of Andes, Delaware county, as shown by the last preceding tax-list or assessment-roll, & do represent a majority of the taxable property upon said list or roll, & do hereby adjudge & determine that the same be entered of record.

Given under my hand, at Delhi, in said county, on the 22d day of May, 1871.

EDWIN D. WAGNER,
County Judge of the County of Delaware."

And that the said adjudication was on said day duly filed and entered in the office of the clerk of the county of Delaware, State of New York; and that upon the same day said county judge made an order whereby he appointed Andrew Hawver, John Dickson, and Andrew Armstrong, residents and freeholders in said town of Andes, commissioners for said town of Andes to carry into effect the provisions of the aforesaid acts and to issue bonds and take stock in the Delhi & Middletown railroad; which order was, on said 22d day of May, 1871, duly filed and entered in the clerk's office of Delaware county; that the said commissioners thereupon duly qualified and entered upon the performance of their duties; that on or about the 15th of November, 1871, Andrew Hawver, one of the said commissioners, resigned his office. and that upon November 15th,
6 1871, George R. Shaver, a freeholder and resident of the said town of Andes, was, by an order of the said county judge, duly appointed a commissioner for the said town of Andes in the place of the said Andrew Hawver, and that the said commissioner duly qualified and entered upon the discharge of his duties; that thereafter and in accordance with the statutes aforesaid the said commissioners duly executed the bonds of the said defendant, under seal, dated the 1st day of September, 1871, in the amount of $98,000, becoming due and payable at the expiration of thirty years from their date and bearing interest at the rate of seven per centum per annum, payable semi-annually on the 1st days of March and September in each year. Thirty of said bonds were of the denomination of $1,000 each, and were numbered from 1 to 30. Seventy-six of said bonds were of the denomination of $500 each, and were numbered from 1 to 76. Three hundred of said bonds were of the denomination of $100 each, and were numbered from 1 to 300. The following is a copy of bond No. 1 of $1,000, and the other bonds are like this except in number and amount:

"No. 1. $1,000.

"UNITED STATES OF AMERICA,

"*State of New York, Town of Andes, County of Delaware.*

"Issued by virtue of an act of the legislature of the State of New York entitled 'An act to authorize the formation of railroad corporations and to regulate the same,' passed April 2d, 1850, and an act to amend an act entitled An act to authorize the formation of railroad corporations and to regulate the same, passed April 2d, 1850,
7 so as to permit municipal corporations to aid in the construction of railroads, passed May 18th (1869), 'sixty-nine, three-fifths being present.

"These acts authorize any city or town, except in the counties of New York, Kings, Erie, Greene, Albany, Westchester, Ontario, Seneca, Yates, Onondaga, and Niagara, to subscribe to the stock of any railroad corporation formed in pursuance of said acts, and these acts authorize the town of Andes to subscribe to the stock of the Delhi and Middletown Railroad Company and to issue town bonds in payment thereof, all necessary and legal proceedings having been taken and had under said acts.

"Know all men by these presents that we, the undersigned, commissioners under the above-entitled acts for the town of Andes, in the county of Delaware and State of New York, upon the faith and credit and in behalf of said town, for value received, promise to pay to the bearer the sum of one thousand dollars on the first day of Sep'b'r (1901), nineteen hundred and one, at the American Exchange National Bank in the city of New York, with interest at seven per cent. per annum, payable semi-annually on the first days of March and September in each year at the same place on the presentation and surrender of the coupons for such interest hereto annexed.

"In witness whereof we have hereunto set our hands and seals and have caused the coupons hereto annexed to be signed by John Dickson, one of our number, this first day of September, in
8 the year one thousand eight hundred and seventy-one.

[Delaware County Seal.]

"ANDREW ARMSTRONG. [L. S.]
"G. R. SHAFER. [L. S.]
"JOHN DICKSON. [L. S.]

"Registered in the county clerk's office of the county of Delaware.

"In witness whereof the clerk of the said county has hereto set his hand and official seal.

"SMITH H. WHITE, *Clerk.*"

V. That annexed to each of said bonds at the time of its execution and issue was a series of coupons numbered respectively from 1 to 60, inclusive, and signed by the said John Dickson, one of said commissioners, by the direction of said commissioners, whereby the said defendant promised and undertook to pay the interest on said bonds semi-annally on the first days of March and September in

each year until the principal of said bonds should by the terms thereof become due and payable.

The following is a copy of coupon No. 21 cut from bond No. 1 of $1,000, and all the other coupons are like this except in number and amount and date of payment:

"$35. The town of Andes, county of Delaware, will pay the bearer hereof, at the American Exchange National Bank in the city of New York, on the **21** first day of March, 1882, the sum of thirty-five dollars for six months' interest then due on bond No. 1.

"$35. JOHN DICKSON,
Commissioner."

9 VI. That thereafter the said commissioners so as aforesaid appointed and qualified did, in pursuance of said acts of the said legislature, duly deliver and issue said bonds of the defendant at their par value to the said Delhi and Middletown Railroad Company and received in exchange therefor, as provided in said acts, stock of said railroad company to an amount equal to that of said bonds at par, which said stock was duly delivered to and accepted by the said defendant and has ever since been and still is held by the said defendant; that the said railroad company accepted and received the said bonds in good faith and for full value; that thereafter the said railroad company sold all the said bonds to divers purchasers, each of whom purchased the same in good faith and for full value; that thereafter and down to and including September 1st, 1881, the said town of Andes regularly paid the interest which fell due upon said bonds and also paid and retired $3,000 of the principal, and that during all of the time from 1871 down to January 1st, 1882, the validity of said bonds was unquestioned by the town of Andes, and the same were bought and sold upon the market as securities of the highest value, but that since January, 1882, the said defendant has refused to pay any portion of the said coupons or to furnish money for the payment thereof at the place where the same are payable.

VII. That before the commencement of this action the plaintiff purchased for value and there was sold to the plaintiff for value certain coupons previously attached to said bonds and in
10 the following schedule described (the coupons numbered 21 fell due March 1st, 1882; the coupons numbered 22 fell due September 1st, 1882, and so on until coupons numbered 36, which fell due September 1st, 1889).

And that the plaintiff now is the owner and holder of each of said coupons, amounting, in face value at the dates of their maturity, to $25,893.00—namely:

Schedule of coupons owned by the plaintiff, giving the number and denomination of the bond from which each coupon was cut and the numbers and face amount of the coupons cut from each bond.

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$1,000 bonds.

No.	1.	4	coupons, Nos.	33–36, inclusive,	each $35.00	$140 00
	2.	"	"	"	"	140 00
	3.	"	"	"	"	140 00
	4.	"	"	"	"	140 00
	5.	"	"	"	"	140 00
	18.	16	"	21–36,	"	560 00
	19.	"	"	"	"	560 00
	20.	15	"	22–36,	"	525 00
	21.	13	"	24–36,	"	455 00
	22.	"	"	"	"	455 00
	23.	"	"	"	"	455 00
	(24.	16	"	21–36,	"	) 560 00
	(25.	"	"	"	"	) 560 00
	26.	13	"	24–36,	"	455 00
	27.	"	"	"	"	455 00
	30.	"	"	"	"	455 00

$500 bonds.

No.	3.	16	coupons, Nos.	21–36, inclusive,	each $17.50	280 00
	4.	"	"	"	"	280 00
	5.	"	"	"	"	280 00
	7.	"	"	"	"	280 00
	14.	4	"	33–36,	"	70 00
	15.	"	"	"	"	70 00
	16.	16	"	21–36,	"	280 00
	17.	4	"	33–36,	"	70 00
	18.	"	"	"	"	70 00
	19.	"	"	"	"	70 00
	20.	16	"	21–36,	"	280 00

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No.	21.	16	coupons, Nos.	21–36, inclusive,	each $17.50	280 00
	28.	15	"	22– "	"	262 50
	(29.	16	"	21– "	"	) 280 00
	31.	4	"	33–36,	"	70 00
	32.	13	"	24–36,	"	227 50
	35.	4	"	33–36,	"	70 00
	39.	"	"	"	"	70 00
	40.	"	"	"	"	70 00
	42.	"	"	"	"	70 00
	43.	"	"	"	"	70 00
	44.	"	"	"	"	70 00
	45.	"	"	"	"	70 00
	46.	"	"	"	"	70 00
	(47.	15	"	22–36,	"	262 50
	48.	13	"	24–36,	"	227 50

No.	49.	15 coupons, Nos.	22–36,	inclusive, each $17.50	----	$262 50
	50.	13 "	24–36,	"	----	227 50
	51.	" "	"	"	----	227 50
	53.	16 "	21–36,	"	----	280 00
	54.	16 "	21–36,	"	----	280 00
	55.	16 "	21–36,	"	----	280 00
	56.	" "	"	"	----	280 00
	57.	13 "	24–36,	"	----	227 50
	58.	" "	"	"	----	227 50
	59.	" "	"	"	----	227 50
	60.	" "	"	"	----	227 50
	61.	" "	"	"	----	227 50
	62.	16 "	21–36,	"	----	280 00
	64.	13 "	24–36,	"	----	227 50
	65.	" "	"	"	----	227 50
	66.	" "	"	"	----	227 50

13

No.	67.	13 coupons, Nos.	24–36,	inclusive, each $17.50	----	227 50
	68.	" "	"	"	----	227 50
	69.	" "	"	"	----	227 50
	70.	" "	"	"	----	227 50
	71.	" "	"	"	----	227 50
	72.	" "	"	"	----	227 50
	73.	" "	"	"	----	227 50
	74.	16 "	21–36	"	----	280 00
	75.	" "	"	"	----	280 00

$100 bonds.

No.	1.	16 coupons, Nos.	21–36,	inclusive, each $3.50	----	56 00
	2.	" "	"	"	----	56 00
	3.	" "	"	"	----	56 00
	4.	" "	"	"	----	56 00
	5.	" "	"	"	----	56 00
	6.	" "	"	"	----	56 00
	7.	" "	"	"	----	56 00
	8.	" "	"	"	----	56 00
	9.	" "	"	"	----	56 00
	10.	" "	"	"	----	56 00
	31.	13 "	24–36	"	----	45 50
	32.	" "	"	"	----	45 50
	37.	15 "	22–36	"	----	52 50
	41.	" "	"	"	----	52 50
	42.	" "	"	"	----	52 50
	43.	" "	"	"	----	52 50
	44.	" "	"	"	----	52 50
	45.	" "	"	"	----	52 50
	46.	" "	"	"	----	52 50
	47.	" "	"	"	----	52 50
	48.	" "	"	"	----	52 50
	49.	" "	"	"	----	52 50

No.	51.	15	coupons, Nos.	22–36,	inclusive, each $3.50----	$52 50
	52.	16	"	21–36	" ----	56 00
	53.	"	"	"	" ----	56 00
	54.	"	"	"	" ----	56 00
	55.	"	"	"	" ----	56 00
	56.	"	"	"	" ----	56 00
	60.	4	"	33–36	" ----	14 00
	61.	"	"	"	" ----	14 00
	62.	"	"	"	" ----	14 00
	63.	"	"	"	" ----	14 00
	64.	"	"	"	" ----	14 00

14

No.	65.	4	coupons, Nos.	33–36,	inclusive, each $3.50----	14 00
	66.	"	"	"	" ----	14 00
	67.	"	"	"	" ----	14 00
	68.	"	"	"	" ----	14 00
	69.	"	"	"	" ----	14 00
	70.	15	"	22–36	" ----	52 50
	71.	13	"	24–36	" ----	45 50
	72.	"	"	"	" ----	45 50
	73.	"	"	"	" ----	45 50
	74.	"	"	"	" ----	45 50
	75.	"	"	"	" ----	45 50
	76.	4	"	33–36	" ----	14 00
	77.	"	"	"	" ----	14 00
	78.	"	"	"	" ----	14 00
	79.	"	"	"	" ----	14 00
	81.	13	"	24–36	" ----	45 50
	82.	"	"	"	" ----	45 50
	83.	"	"	"	" ----	45 50
	84.	"	"	"	" ----	45 50
	85.	"	"	"	" ----	45 50
	86.	"	"	"	" ----	45 50
	87.	16	"	21–36	" ----	56 00
	88.	"	"	"	" ----	56 00
	89.	16	"	21–36	" ----	56 00
	90.	13	"	24–36	" ----	45 50
	91.	"	"	"	" ----	45 50
	92.	"	"	"	" ----	45 50
	93.	"	"	"	" ----	45 50
	94.	"	"	"	" ----	45 50
	95.	"	"	"	" ----	45 50
	96.	"	"	"	" ----	45 50
	97.	"	"	"	" ----	45 50
	98.	"	"	"	" ----	45 50
	99.	4	"	33–36	" ----	14 00
	100.	"	"	"	" ----	14 00
	101.	"	"	"	" ----	14 00
	102.	"	"	"	" ----	14 00
	103.	"	"	"	" ----	14 00

No. 104.	4	coupons, Nos.	33–36,	inclusive, each	$3.50----	$14 00
105.	"	"	"	"	----	14 00
106.	"	"	"	"	----	14 00
107.	"	"	"	"	----	14 00
108.	"	"	"	"	----	14 00
109.	"	"	"	"	----	14 00
110.	"	"	"	"	----	14 00
111.	15	"	22–36	"	----	52 50
112.	"	"	"	"	----	52 50
113.	"	"	"	"	----	52 50
114.	"	"	"	"	----	52 50
115.	"	"	"	"	----	52 50
116.	"	"	"	"	----	52 50
117.	"	"	"	"	----	52 50
118.	"	"	"	"	----	52 50
119.	"	"	"	"	----	52 50
120.	"	"	"	"	----	52 50
121.	"	"	"	"	----	52 50

15

No. 122.	15	coupons, Nos.	22–36,	inclusive, each	$3.50----	52 50
123.	"	"	"	"	----	52 50
124.	"	"	"	"	----	52 50
125.	"	"	"	"	----	52 50
126.	"	"	"	"	----	52 50
127.	"	"	"	"	----	52 50
128.	"	"	"	"	----	52 50
154.	16	"	21–36	"	----	56 00
155.	"	"	"	"	----	56 00
156.	"	"	"	"	----	56 00
157.	13	"	24–36	"	----	45 50
158.	"	"	"	"	----	45 50
159.	"	"	"	"	----	45 50
160.	"	"	"	"	----	45 50
161.	"	"	"	"	----	45 50
162.	"	"	"	"	----	45 50
163.	"	"	"	"	----	45 50
164.	"	"	"	"	----	45 50
165.	16	"	21–36	"	----	56 00
166.	13	"	24– "	"	----	45 50
167.	"	"	"	"	----	45 50
168.	16	"	21– "	"	----	56 00
169.	13	"	24– "	"	----	45 50
170.	16	"	21–36	"	----	56 00
171.	13	"	24–36	"	----	45 50
172.	"	"	"	"	----	45 50
173.	16	"	21–36	"	----	56 00
174.	"	"	"	"	----	56 60
175.	13	"	24–36	"	----	45 50
176.	"	"	"	"	----	45 50
177.	"	"	"	"	----	45 50

No. 178.	13	coupons,	Nos.	24–36,	inclusive, each $3.50	$45 50
179.	"	"	"	"		45 50
180.	"	"	"	"		45 50
181.	"	"	"	"		45 50
182.	16	"		21–36	"	56 00
183.	13	"		24–36	"	45 50
184.	16	"		21–36	"	56 00
185.	"	"	"	"		56 00
186.	"	"	"	"		56 00
187.	"	"	"	"		56 00
188.	13	"		24–36	"	45 50
189.	"	"	"	"		45 50
190.	"	"	"	"		45 50
192.	16	"		21–36	"	56 00
193.	"	"	"	"		56 00
194.	13	"		24–36	"	45 50
198.	16	"		21–36	"	56 00
201.	"	"	"	"		56 00
202.	13	"		24–36	"	45 50
204.	"	"	"	"		45 50
207.	"	"	"	"		45 50
208.	"	"	"	"		45 50
209.	"	"	"	"		45 50
210.	16	"		21–36	"	56 00
211.	13	"		24–36	"	45 50

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No. 212.	13	coupons,	Nos.	24–36,	inclusive, each $3.50	45 50
214.	"	"	"	"		45 50
215.	"	"	"	"		45 50
216.	16	"		21–36	"	56 00
217.	"	"	"	"		56 00
218.	13	"		24–36	"	45 50
219.	"	"	"	"		45 50
220.	"	"	"	"		45 50
222.	16	"		21–36	"	56 00
223.	"	"	"	"		56 00
224.	13	"		24–36	"	45 50
228.	"	"	"	"		45 50
230.	16	"		21–36	"	56 00
231.	"	"	"	"		56 00
233.	13	"		24–36	"	45 50
234.	"	"	"	"		45 50
236.	"	"	"	"		45 50
238.	"	"	"	"		45 50
240.	16	"		21–36	"	56 00
241.	13	"		24–36	"	45 50
242.	"	"	"	"		45 50
243.	"	"	"	"		45 50
244.	"	"	"	"		45 50
246.	"	"	"	"		45 50

No. 247.	13	coupons,	Nos. 24–36,	inclusive,	each $3.50----	$45 50
248.	"	"	"	"	----	45 50
249.	"	"	"	"	----	45 50
250.	"	"	"	"	----	45 50
251.	16	"	21– "	"	----	56 00
252.	13	"	24– "	"	----	45 50
254.	"	"	"	"	----	45 50
257.	"	"	"	"	----	45 50
258.	"	"	"	"	----	45 50
259.	"	"	"	"	----	45 50
260.	"	"	"	"	----	45 50
261.	"	"	"	"	----	45 50
262.	"	"	"	"	----	45 50
264.	"	"	"	"	----	45 50
265.	"	"	"	"	----	45 50
266.	16	"	21– "	"	----	56 00
267.	13	"	24– "	"	----	45 50
268.	"	"	"	"	----	45 50
269.	"	"	"	"	----	45 50
270.	"	"	"	"	----	45 50
274.	"	"	"	"	----	45 50
277.	"	"	"	"	----	45 50
278.	"	"	"	"	----	45 50
289.	"	"	"	"	----	45 50
290.	"	"	"	"	----	45 50
291.	"	"	"	"	----	45 50
292.	"	"	"	"	----	45 50
293.	"	"	"	"	----	45 50
294.	"	"	"	"	----	45 50
295.	"	"	"	"	----	45 50

17

No. 296.	13	coupons,	Nos. 24–36,	inclusive,	each $3.50----	45 50
297.	"	"	"	"	----	45 50
298.	"	"	"	"	----	45 50
299.	"	"	"	"	----	45 50
300.	"	"	"	"	----	45 50

Wherefore the plaintiff demands judgment against the defendant for $25,893.00, with interest upon each of said coupons from the time when the same fell due as aforesaid, besides the costs of this action.

Dated December 30, 1889.

JOHN B. GLEASON,
Attorney for Plaintiff, 115 *Broadway, N. Y. City.*

STATE OF NEW YORK, }
City and County of New York, } ss:

John B. Gleason, being duly sworn, says that he is the attorney for the plaintiff in this action, and that the foregoing complaint is true of his own knowledge, except as to the matters therein stated

to be alleged on information and belief, and that as to those matters he believes it to be true.

That the plaintiff does not reside in the county of New York, where his said attorney resides, but resides at South Norwalk, Connecticut, and that deponent is much more familiar with the facts alleged in the complaint as to the issuing of said bonds, &c., than is the plaintiff. Wherefore deponent makes this affidavit.

JOHN B. GLEASON.

Sworn to before me this 30th day of December, 1889.

AUGUSTUS B. CARRINGTON,
Notary Public, N. Y. Co.

18 (Indorsed:) U. S. circuit court. Dudley P. Ely, plaintiff, against The Town of Andes, defendant. Original summons and complaint. J. B. Gleason, att'y for plaintiff, 115 Broadway, N. Y. city. Filed Dec. 31, 1890. W. S. Doolittle, clerk.

19 *Amended Answer.*

United States Circuit Court, Northern District of New York.

DUDLEY P. ELY, Plaintiff,
ag'st
THE TOWN OF ANDES, Defendant.

The defendant for an amended answer herein—

First.

Admits that it is and for the thirty years last past has been one of the towns of the county of Delaware, in the State of New York.

Second.

The defendant, further answering the plaintiff's complaint, denies upon information and belief each and every of the allegations therein contained, except as above admitted.

Third.

The defendant, further answering the plaintiff's complaint herein and as a further defence thereto, alleges on information & belief that at the time of the commencement of this action there was another action pending in the court of appeals of the State of New York, which was commenced on or about January 1st, 1882, in the supreme court of said State and brought by Malcom Calhoun and twenty-five other residents and tax-payers of the defendant town, pursuant to the laws of the State of New York, against
20 George H. Millard, the Hudson City Saving Institution, the Kingston National bank, the Rondout saving bank, Mrs. Columbus Vandusen, David Kenedy, James Stewart, the Town of Delhi, John R. Newkirk, Thomas Hastings, James M. Hastings, Elizabeth Hastings, Sarah M. Phyfe, Lyle Thomson, Mary Douglass, Kate M. Campbell, Thomas Lee, and Jenette E. McMurdy, who were then

the owners and holders of the bonds, coupons, and obligations set forth in the complaint, if any such were ever issued, and against other persons proper parties to said action, the object of which action and the relief demanded therein was to restrain the said persons and corporations so holding and owning the said bonds, coupons, and obligations from transfer-ing the same, from enforcing and collecting them against and from the defendant in this action or the plaintiff in said action on other tax-payers of this defendant, and to prevent the funds and property of the defendant from being wasted by being applied to the payment of the same or any part thereof, and, with this object in view, the supervisor of said defendant, who then had funds in his hands which had been raised for the purpose of paying interest on the bonds mentioned in the complaint or some of them, was also made a defendant in said action; that it was and is alleged in the complaint in said action in substance that whatever bonds, coupons, or obligations of the tenor and effect set forth in the complaint herein had ever been issued were unlawfully issued and without authority of law and were null and void and were not valid or legal obligations of the defendant herein; that said court
21 in which said action was brought had jurisdiction thereof and of the subject-matter of said action and of all the parties thereto.

And defendant further alleges that if the plaintiff had any of the obligations set forth in his complaint herein at the time of the commencement of this action, they were transferred to him and were taken and received by him during the pendency of the aforesaid action commenced in the New York supreme court as aforesaid and now pending in the court of appeals with full knowledge on his part of the pendency of such action, as this defendant is informed and believes, and for the purpose and with the intent of avoiding and nullifying the effect of any judgment which the plaintiff might recover in said action; that the complaint in said action commenced in the New York supreme court was duly filed in the clerk's office of the county of Delaware, N. Y., where said action was triable and where the property affected thereby was situated, and at the time of filing said complaint a notice of the pendency of said action was duly filed, recorded, and indexed in said clerk's office pursuant to and as required by the laws of the State of New York, and that this plaintiff received said obligations after the filing of said complaint and after the filing, recording, and indexing of said notice, and this defendant alleges that the pendency of said action is a bar to plaintiff's right to maintain this action.

22 Fourth.

Upon information and belief the defendant further alleges that the bonds, obligations, & coupons set forth in the complaint in this action have been held to be null & void by the court of appeals of the State of New York in the case of Craig against The Town of Andes, reported in 93d New York Reports, at page 405, and that this plaintiff purchased such coupons after such decision was made and filed, of which decision he had full knowledge and information

at the time of his aforesaid purchase, and that such coupons were all apparently overdue; and the said plaintiff knew before the time of such alleged purchase that the validity of all such bonds and coupons was disputed by this defendant, and plaintiff is not and never was a *bona fida* holder thereof.

Fifth.

The defendant for a further answer and defence herein alleges on information and belief that the county judge of Delaware county, who is alleged in the plaintiff's complaint to have made the adjudication as therein set forth, had no jurisdiction of such proceedings and had no lawful right to make such adjudication, because he was stockholder in the railroad company therein mentioned and was one of the persons named as an incorporator of said railroad company, and that such adjudication was wholly without jurisdiction and was absolutely null and void.

23

Sixth.

The defendant for a further answer and defence herein alleges on information and belief that the said railroad company mentioned and described in plaintiff's complaint was never duly incorporated, and had no lawful right to issue stock or to receive the bonds or obligations of this defendant in exchange for such stock or for any purpose or under any pretence whatever.

Seventh.

The defendant, further answering the complaint, alleges on information and belief that the plaintiff ought not to have or maintain this action for the reason that if no assignment or transfer of the alleged coupons and instruments set forth in the complaint had been made to the plaintiff suit could not have been lawfully brought or maintained in this court to recover for or on account of the contents thereof, and this court would have had no jurisdiction of any suit thus brought and has no jurisdiction of this action.

Eighth.

The defendant, further answering the complaint, alleges that as to all the coupons and instruments set forth in the complaint alleged therein to have become due and payable on or prior to September 1st, 1883, the plaintiff ought not to have or maintain this action because more than six years have elapsed since the cause of action therefor accrued.

24

Ninth.

The defendant, further answering, alleges on information and belief that none of the coupons and obligations mentioned and described in plaintiff's complaint were issued in the manner or form required by law, but each and every of them that were issued were unauthorized by law and were and are as against this defendant absolutely null & void.

Wherefore defendant demands that plaintiff's complaint be dismissed with costs.

W. H. JOHNSON,
Defendant's Att'y.

Office & P. O. address, Ford block, Oneonta, N. Y.

STATE OF NEW YORK, } ss:
Otsego County, }

James Taylor, of Andes, in the county of Delaware, being duly sworn, deposes and says that he is the supervisor of said Town of Andes, Delaware county, N. Y., the above-named defendant; that he has heard the foregoing answer read and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JAMES TAYLOR.

Sworn and subscribed before me February 25, 1890.
FRED. K. WASHBOW,
Notary Public.

25 (Indorsed:) United States circuit court, northern district of New York. Dudley P. Ely ag'st The Town of Andes. Amended answer. W. H. Johnson, defendant's att'y; office & P. O. address, Ford block, Oneonta, N. Y. J. B. Gleason, Esq., pl'ff's att'y. Filed Dec. 31, 1890. W. S. Doolittle, clerk.

26 *Minutes of Trial.*

At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the U. S. court-house, in the city of Syracuse, on the 18th day of November, A. D. 1890.

Present: The Honorable William J. Wallace, judge.

DUDLEY P. ELY }
vs.
THE TOWN OF ANDES. }

Appearances: For the plaintiff, Mr. J. B. Gleason; for the defendant, Mr. W. H. Johnson.

On motion of plaintiff's attorney—

Ordered that a jury be empaneled, and that the trial of this action do now proceed.

Whereupon the following-named jurors were called and sworn: Anthony S. Webb, Emerson H. Adams, John H. Mauro, Charles Osterhout, Orrin F. Plumb, Thomas Ryan, Frank Holmes, Michael Borrett, Charles W. Snow, L. A. Swarthout, Charles G. Lathrop, Delos H. Johnson.

Mr. Gleason opens for plaintiff.

27 Plaintiff's witnesses:

Depositions.

John B. Gleason.

The court here adjourned until 10 a. m. to-morrow.

WEDNESDAY, *November* 19, 1890—10 a. m.

Court meets pursuant to adjournment.
Present: The Honorable William J. Wallace, judge.
Trial resumed.
Plaintiff's witnesses:
Depositions.
Defendant's counsel, Mr. Johnson, moves for dismissal for want of jurisdiction and for a direction of a verdict for defendant.
Motion denied.
Mr. Johnson opens for defendant.
Defendant's witnesses:
Depositions.
The jury here under the direction of the court render a verdict in favor of the plaintiff for $32,352.62.
Exception by defendant.
Ordered that proceedings on the verdict be stayed for sixty days, in which defendant may make and file bill of exceptions.
Filing and cancellation of bonds and coupons at judgment is waived by defendant.

28 *Stipulation.*

United States Circuit Court, Northern District of New York.

DUDLEY P. ELY
against
THE TOWN OF ANDES.

Stipulated that the order of November 19th, 1890, is so far modified that the plaintiff shall be at liberty forthwith to enter judgment without prejudice to any of defendant's rights under the said order and without prejudice to any right which def't may now have in regard to procuring writ of error to remove said judgment in U. S. Supreme Court.
Dated Dec. 27, 1890.

JOHN B. GLEASON,
Plaintiff's Attorney.
W. H. JOHNSON,
Defendant's Attorney.

(Indorsed:) U. S. circuit court. Dudley P. Ely ag't The Town of Andes. 2507. Stipulation to enter judgment. Dated Dec. 27, 1890. Filed Dec. 31, 1890. W. S. Doolittle, clerk.

29 *Judgment.*

United States Circuit Court, Northern District of New York.

DUDLEY P. ELY
against
THE TOWN OF ANDES.

This action, being at issue upon the verified complaint and answer of the parties, was duly brought on to trial at a circuit of this court, held at Syracuse, upon the 18th day of November, 1890, before the Hon. William J. Wallace and a jury, and the jury, by the direction of the court, rendered their verdict in favor of the plaintiff for the sum of $32,352.63, of which sum $25,630.50 was for the face amount of the coupons described in the complaint, excluding coupon No. 21 of $17.50 from bond No. 28 of $500, which coupon was not produced and is not owned by the plaintiff, and the residue of said verdict was for interest upon the said coupons from the times of default in their payment. Upon a recomputation of such interest it appears that the correct amount thereof is $6,694.30, making the total $32,324.80, and the plaintiff consenting to reduce the verdict to this latter sum and the costs of the said plaintiff having been taxed at the sum of $120.25:

Now, on motion of John B. Gleason, plaintiff's attorney, it
30 is adjudged that the plaintiff, Dudley P. Ely, do recover of the defendant, The Town of Andes, the sum of thirty-two thousand three hundred and twenty-four and $\frac{80}{100}$ ($32,324.80) dollars, with interest from the day of said trial, amounting to $231.66, together with the sum of $120.25 for said cost as taxed, amounting in the aggregate to the sum of thirty-two thousand six hundred seventy-six dollars and seventy-one cents ($32,676.71).

Judgment signed, entered, and docketed this 31 day of December, 1890, at 3 o'clock p. m.

W. S. DOOLITTLE, *Clerk.*

(Indorsement on cover:)

At law. No. 2937. U. S. circuit court, northern district of New York. Dudley P. Ely *vs.* The Town of Andes. Judgment-roll.

Damages	$32,324 80
Interest	231 66
Costs	120 25
Judgment	$32,676 71

John B. Gleason, pl'ff's att'y, 115 Broadway, New York city. Filed and entered Dec. 31, 1890, at 3 o'clock p. m. W. S. Doolittle, clerk.

31 *Bill of Exceptions.*

United States Circuit Court, Northern District of New York.

DUDLEY P. ELY
against
THE TOWN OF ANDES.

This action was brought to trial before Hon. William J. Wallace, circuit judge of the northern district of New York, and a jury, at a regular circuit of this court held at Syracuse, New York, upon the 18th day of November, 1890, Mr. John B. Gleason appearing as attorney for the plaintiff and Mr. William H. Johnson and Isaac H. Maynard appearing as attorneys and counsel for the defendant, when the following proceedings were had:

The plaintiff offered in evidence the following laws of the State of New York:

Chapter 140 of the Laws of 1850, known as the general railroad law.
Chapter 907 of the Laws of 1869, known as the town bonding act.
Chapter 507 of 1870.
Chapter 905 of 1871.
Chapter 453 of 1874.
Chapter 153 of 1875.

32 Plaintiff offered in evidence the certificate of incorporation of the Delhi and Middletown Railroad Company filed November 14th, 1870, in the office of the secretary of the State of New York.

Mr. JOHNSON: We will object to the record.
The COURT: Raise these objections afterwards.

The certificate of incorporation was received in evidence and the following is a copy of it:

(*Copy Certificate of Incorporation.*)

We, whose names are hereunto annexed, do hereby certify that we have associated together for the purpose of constructing a railroad in the county of Delaware and State of New York, to be called the Delhi and Middletown railroad, leading from the village of Delhi through the town of Bovina, near Livingston lake, and the town of Andes to Arkville, in the town of Middletown, in said county, a distance of about twenty-five miles; that the amount of the capital stock of the company is one million of dollars, and is divided into (10,000) shares of one hundred dollars each, and that the following are the names and places of residence of the thirteen directors of said company:

Robert J. Livingston, New Brunswick, N. J.
Charles Hathaway, Delhi.

Henry Dowie & William B. Shafer, of Andes.
Richard Morse, Andes.
Lemuel Sines, Middletown.
W. Ward Grant, Middletown.
Seth H. White, Delhi.
Alex. Storie, Bovina.
33 John Hilson, Bovina.
James H. Graham, Delhi.
George G. Decker, Middletown.
Thomas Cornell, Rondout.
The said company shall continue for one hundred years.
May 25th, 1870.

Names of subscribers.	Residence.	Amount of subscription.	
Charles Hathaway	Delhi	Ten shares	$1,000
W. W. Grant	Middletown	Ten shares	1,000
Seth H. White	Delhi	Ten shares	1,000
J. H. Graham	Delhi	Ten shares	1,000
Thomas Cornell	Rondout	Thirty shares	3,000
W. Murray	Delhi	Ten shares	1,000
Robert J. Livingston	New Brunswick	Fifty shares	5,000
Richard Morse	Andes	Ten shares	1,000
Lemuel Sines	Middletown	Ten shares	1,000
White Griswold	Walton	Thirty shares	3,000
S. D. Coykendall	Rondout	Ten shares	1,000
John Hilson	Bovina	Two shares	200
Robert N. Hanmer	Andes	One share	100
Butler Fitch	Delhi	One share	100
C. A. Foot & Duter Pettingill, 1 share	Delhi	One share	100
John Bleakie	Andes	One share	100
Horace K. Thurber	N. Y. city	Ten shares	1,000
Edwin D. Wagner	Delhi	One share	100
H. England	Delhi	One share	100
Almiron Fitch	Delhi	One share	100
J. K. Hood	Andes	One share	100
W. B. Shafer	Andes	One share	100
F. V. Bishop	Andes	One share	100
Andrew McLean	Andes	One share	100
Adam T. Raitt	Andes	One share	100
Henry Dickson	Andes	One share	100
Alonzo Ballard	Andes	One share	100
William Oliver	Andes	One share	100
Nelson Tompkins	Middletown	One share	100
Provided the road is	located through	Lumberville.	
W. W. Clark	Middletown	One share	100
E. J. Sanford	Middletown	One share	100
A. R. Henderson	Middletown	One share	100

Names of subscribers.	Residence.	Amount of subscription.	
G. G. Decker	Middletown	Two shares	$200
O. M. Allaben	Middletown	Five shares	500
John Hamilton	Andes	Two shares	200
Pheobe Bryant	Andes	One share	100
Marcus P. Bryant	Andes	One share	100
Thomas S. Miller	Andes	One share	100
E. W. Brace	Andes	One share	100
R. O. Gladstone	Andes	One share	100
Peter King	Andes	One share	100
Andrew Hawver	Andes	Two shares	200
34 If the road goes	by Shavertown.		
A. A. Shaver	Andes	One share	100
James Jenkins	Andes	Two shares	200
Anson Jenkins	Andes	One share	100
O. F. Miner	Andes	One share	100
P. N. Bassett	Andes	100	100
L. D. Jackson	Middletown	Five shares	500
John Whitney	Middletown	Two shares	200
John Gregory	Middletown	Three shares	300
L. G. Jenkins	Middletown	One share	100
Sam'l Gregory	Middletown	Two shares	200
Alex. Storie	Bovina	Two shares	200
Henry Dowie	Andes	One share	100
John McMurray	Delhi	Two shares	200

STATE OF NEW YORK, *Delaware County,* } ss:

James H. Graham, Charles Hathaway, and Seth H. White, being duly sworn, say and each for himself says that he is a director named in the within articles of association, and at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto and the per cent. paid thereon in good faith and in cash to the directors named in said articles of association; and deponents further say and each for himself further says that the amount of stock required by sec. two, title thirteen, chap. eighteen of second vol. of the Revised Statutes, fifth edition, part first, has been in good faith subscribed and ten per cent. paid in cash thereon as aforesaid, and that it is intended in good faith to construct and to maintain and operate the road mentioned in such articles of association.

JAMES H. GRAHAM.
SETH H. WHITE.
CHAS. HATHAWAY.

Sworn and subscribed before me this November 12th, 1870.

JONAS M. PRESTON.
Justice of the Peace.

[5c. inter. rev. stamp cancelled.]

35 (Endorsed:) Articles of association of the Delhi and Middletown railroad. Filed Nov. 14th, 1870. D. Willers, Jr., dep. sec'y of state. Recorded in Book No. 3 of Railroad Corporations, in secretary's office, at page 474.

STATE OF NEW YORK, *ss:*

OFFICE OF THE SECRETARY OF STATE.

I have compared the preceding with the original articles of association of the Delhi and Middletown railroad, with affidavit thereto annexed, filed and recorded in this office on the fourteenth day of November, 1870, and hereby certify the same to be a correct transcript therefrom and of the whole of said original.

Witness my hand and seal of office, at the city of Albany, this eighteenth day of April, one thousand eight hundred and eighty-two.

JOSEPH B. CARR,
Secretary of State.

Next there was received in evidence on the part of the plaintiff the map and profile of the Delhi and Middletown railroad filed in the office of the clerk of Delaware county March 4th, 1871. The plaintiff in error will produce this map or a copy of it upon the argument. The following certificate was written upon the map:

"We, the undersigned, being the president and chief engineer of the Delhi and Middletown Railroad Company, do hereby certify that this is a correct map and profile of the route intended to be adopted by said company for their railroad connecting with the Rondout and Oswego railroad on the lands of J. H. Dean, in
36 the town of Middletown, and extending to the village of Delhi, all in the county of Delaware, State of New York.

J. H. GRAHAM, *President.*
J. P. GOULD,
Chief Engineer."

Plaintiff then offered in evidence a certified copy of a petition and heading, marked No. 7 on the back of it, and with the verification of James H. Davis, one of the signers, also endorsed upon the back of it, of which the following is a copy:

(*A Copy of Petition No.* 7.)

To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition and say that we are such a majority of tax-payers and represent such a majority of taxable property, and that we desire that such

town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000), in accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize the formation of railroad corporations and to regulate the same, passed April second, eighteen hundred and fifty, so as to permit municipal corporations to aid in the construction of railroads," passed May eighteenth, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of tax-
37 able property, as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi and Middletown Railroad Company, an association formed in said county and State.

November 23d, 1870.

JOHN WHITNEY.
WILLIAM R. ACKERLY.
JNO. T. HADDOW.
ROBERT FLETCHER.
WILLIAM A. HADDOW.
G. W. SHAFER.
JAMES DAVIS.
DAVID TUTTEL.
JANE R. ROBSON.
JOHN FOWLER.
JAMES A. SHAFER.
PHILLIP ALLEN.
LEWIS BUSSEY.
WALTER K. MILLER.
J. J. NORTHRUP.
JAMES CROSIER.
GEORGE DOUGHRTY.
MICAIAH CORBIN.
JAS. N. SCOTT.
JAMES MUIR.
MILLER AND LAIDLOWS.
W. C. LAING.
A. CAMPBELL.
MRS. MARY A. BRAMLEY.
HARRIE DOWIE, JR.
ALEX. B. DOUGLAS.
her
ELIZABETH x BARNHART.
mark.

In presence of—

C. CARMAN.
JAMES GRAY.
D. B. SHAFER.
WILLIAM R. WHITNEY.
JAMES NEISH.
HASBROUCK SHAFER.
JONAH T. HOTCHKISS.
PETER H. SHAFER.

N. Y. SHAFER.
LEWIS TICHT.
RICHARD E. HITT.
JOHN CARMAN.
WM. GARRICK.
JOHN G. CAIRNS.
JOHN BECKWITH.
JOHN ROBSON.
GEORGE POTTS.
ROBERT McFARLANE.
I. J. HUGHES.
J. R. NEWKIRK.

DELAWARE COUNTY, *ss:*

James H. Davis, being duly sworn, says that he is one of the petitioners mentioned in the foregoing application; that he has read the said application and knows the contents thereof, and that same is true of his own knowledge except the facts therein stated on information and belief, and as to these facts he believes it to be true.

JAMES H. DAVIS.

Sworn and subscribed before me this 6th day of May, 1871.
W. MURRAY, JR.,
Justice of Sup. Court.

(Endorsed:) No. 7. Filed May 6th, 1871.

38 Plaintiff then offered in evidence certified copies of fifteen papers with the same heading, except as hereinafter specified, marked respectively Nos. 2, 3, 5, 6, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19. The word "inhabitants" was in the first line of No. 19, so that it reads, "We, the undersigned, tax-payers, inhabitants of the town of Andes," &c. No verification was attached to or endorsed upon any petition except petition No. 7, and the following number of names were signed to the said petitions:

No. 2, 2; No. 3, 2; No. 5, 4; No. 6, 22;
No. 8, 21; No. 9, 8; No. 10, 2; No. 11, 2;
No. 12, 77; No. 13, 12; No. 15, 8; No. 16, 4;
No. 17, 8; No. 18, 6; No. 19, 14.

Next the plaintiff offered in evidence a notice dated May 6, 1871, under the hand of the county judge of Delaware county, and an order of the same date and proof of publication of said notice endorsed May 22, 1871; also adjudication of the county judge, dated May 22, 1871; also an order appointing commis-ioners of the same date; also transcript from the judgment book, Delaware county clerk's office, of May 22, 1871; also docket of judgment entered in said clerk's office May 22, 1871; also record of the judgment from Register No. 3, at page 169, Delaware county clerk's office, entered May 22, 1871.

39 The following are copies of said papers:

To whom it may concern:

Notice is hereby given that a petition purporting to be signed by a majority of the tax-payers of the town of Andes, in the county of Delaware, representing a majority of the taxable property in the limits of said town, duly verified by one of the petitioners, has been filed in my office, and that I shall proceed on the 22d day of May next, at 1 o'clock p. m., to take proof of the facts set forth in said petition as to the number of tax-payers joining in such petition and as to the amount of taxable property represented by them.

Given under my hand, at Delhi, in said county, on the 6th day of May, 1871.

EDWIN D. WAGNER,
County Judge of Delaware County.

On reading and filing the annexed petition of a majority of the tax-payers of the town of Andes, Delaware county, representing a majority of the taxable property in the limits of said town, verified by James H. Davis, one of said petitioners, setting forth that they are such a majority of tax-payers and represent such a majority of the taxable property, and that they desire said town of Andes shall create and issue its bonds to the amount of ninety-eight thousand dollars and invest the same or the proceeds thereof in the stock of the Delhi and Middletown Railroad Company, an association formed in said county and State:

Now, on motion of White and Jacobs, attorneys for said petitioners, that a notice be forthwith published in the Andes Recorder, a newspaper published in said county, directed to whom it may concern, that on the 22d day of May, 1871, I shall proceed to take proof of the facts set forth in said petition as to the number of tax-payers joining in such petition and as to the amount of the taxable property represented by them.

Delhi, May 6th, 1871.

EDWIN D. WAGNER,
County Judge of Delaware County.

DELAWARE COUNTY, *ss:*

Bryson Bruce, of Andes, in said county, being duly sworn, says that he is editor, proprietor, and publisher of the Andes Recorder, a newspaper published in said town of Andes; that the annexed notice was first inserted and published in said paper on the 11th day of May, 1871, and continued in said paper till the 22d inst.; that the said notice was published in said paper more than ten days before the 22d inst., the time appointed by the county judge to take proof, &c.

BRYSON BRUCE.

Sworn and subscribed before me this 22d day of May, 1871.

JAMES F. SCOTT,
Notary Public.

In the matter of the petition of a majority of the tax-payers of the town of Andes, representing a majority of the taxable property in the limits of said town, on an application *on* to the county judge of Delaware county, to create & issue its bonds to the amount of ninety-eight thousand dollars.

Whereas a majority of the tax-payers of the town of Andes, in the county of Delaware, representing a majority of the taxable property in the limits of said town, made application to me by a petition, verified by one of the petitioners, setting forth that they were such a majority of tax-payers & represent such a ma-
41 jority of taxable property, & that they desired that such town create & issue its bonds to the amount of ninety-eight thousand dollars; and whereas on the 6th day of May, 1871, I issued an order that a notice be published in the Andes Recorder, a newspaper published in said town of Andes, setting forth that on the 22d day of May, 1871, I would proceed to take proof of the facts set forth in the said petition as to the number of tax-payers joining in such petition & as to the taxable property represented by them; & whereas due proof having been made before me of the due publication of said notice more than ten days previous to this date; & whereas due proof as to the said allegations in said petition having been made before me, & it appearing satisfactor-y to me that the said petitioners do represent a majority of the tax-payers of said town of Andes, as shown by the last preceding tax-list or assessment-roll, and do represent a majority of the taxable property upon said list or roll, on motion of White & Jacobs, att'ys for petitioners, I do hereby adjudge & determine that said petitioners do represent a majority of the tax-payers of said town of Andes, Delaware county, as shown by the last preceding tax-list or assessment-roll, & do represent a majority of the taxable property upon said list or roll, & do hereby adjudge & determine that the same be entered of record.

Given under my hand, at Delhi, in said county, on the 22d day of May, 1871.

EDWIN D. WAGNER,
County Judge of the County of Delaware.

Know all men by these presents that I, Edwin D. Wagner, county judge of Delaware county, in the State of New York, having determined that the petitioners of the town of Andes do repre-
42 sent a majority of the taxable property of said town & a majority of the tax-payers of said town, have appointed & do hereby appoint Andrew Hawver & John Dickson & Andrew Armstrong, residents and freeholders in said town of Andes, commissioners for said town of Andes to carry into effect the provisions of an act entitled "An act to amend an act entitled An act to authorize the formation of railroad corporations & to regulate the same, passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869, $\frac{3}{5}$ being present, to issue bonds and to take stock in the Delhi & Middletown railroad.

Witness my hand & seal this 22d day of May, 1871.

EDWIN D. WAGNER, [L. S.]
County Judge of Delaware County.

DELAWARE COUNTY, *ss:*

Andrew Hawver, John Dickson, and Andrew Armstrong, each being duly sworn, does each for himself say that he will support the Constitution of the United States and the constitution of the State of New York, and that he will faithfully discharge al- the duties of the office of railroad commissiondr for the town of Andes for the purpose of issuing bonds and taking stock in the Delhi & Middletown railroad.

ANDREW HAWVER.
ANDREW ARMSTRONG.
JOHN DICKSON.

Sworn and subscribed before me this 22d day of May, 1871.
EDWIN D. WAGNER,
County Judge of Delaware County.

Against whom judgment is rendered: Town of Andes.
In whose favor judgment is rendered: In the matter of bonding the town of Andes for the Delhi and Middletown railroad.
43 Where perfected—court: Delaware Co.
Judgment: Damages & costs, $98,000.
When perfected: May 22d, 1871, 5 p. m.
Attorney or justice: White & Jacobs.
Delhi, N. Y., October 19th, 1885.

STATE OF NEW YORK, }
Delaware County. }

CLERK'S OFFICE.

I do hereby certify that I have compared the foregoing transcript of the docket of a judgment docketed in this office with the original docket thereof, and that the same is a correct transcript therefrom and of the whole of said original.

JAMES G. JESTER, [L. S.]
Deputy Clerk.

Also docket of judgment, of which the following is a copy:
In the matter of bonding the town of Andes for the Delhi and Middletown railroad. Entered in the Delaware county clerk's office May 22d, 1871, at 5 p. m., against the town of Andes for $98,000.
Also resignation of Andrew Hawver as commissioner, filed with the county judge of Delaware county prior to the appointment of Geo. R. Shaver.
Also certified copy of the appointment of Geo. R. Shaver as commissioner in place of Hawver and his oath of office, of which the following are copies:

In pursuance of an act of the legislature passed May 18, 1869, and entitled "An act to amend an act entitled An act to authorize the formation of railroad corporations and to regulate the same," passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads, and of the act amendatory thereto—

44 I, Edwin D. Wagner, county judge of the county of Delaware, do hereby appoint George R. Shaver, a freeholder and resident of the town of Andes, in the county of Delaware, to be a railroad commissioner for said town of Andes for the unexpired term and to fill the vacancy occasioned by the resignation of Andrew Hawver dated November 15, 1871, to carry into effect the purposes and provisions of said act and acts amendatory thereto.

Witness my hand and seal this 15th day of November, 1871.

EDWIN D. WAGNER, [L. S.]
County Judge of Delaware County.

(Endorsed:) Appointment of George R. Shaver R. R. commissioner. Filed Nov. 15th, 1871.

Oath of office in same form as other commissioner *ante.*

Either party may produce upon the argument certified copies of all of said petitions and papers.

Plaintiff then read in evidence the deposition of JOHN DICKSON, of which the following is a copy:

I reside in Andes and am one of the persons appointed railroad commissioners. Andrew Armstrong and Andrew Hawver were also appointed. Hawver met once or twice with us, but took no part in the issue of the bonds. I have here the book of minutes kept by the commissioners. We first met May 22, 1871, and subscribed to the stock of the Delhi and Middletown railroad to the amount of $98,000 in behalf of the town of Andes. We all three signed the subscription paper; did nothing else that day; next meet August 19, 1871; appointed Armstrong chairman and myself clerk and treasurer; appointed Armstrong to procure the bonds to be printed; November 16th issued $9,000 of the bonds.

45 Conceded that these bonds were in the form of the bonds set forth in the complaint, except as to numbers and amounts.

Witness continued: These bonds were signed by Andrew Armstrong, George R. Shaver, and myself. 8 of these bonds were $500 each and numbered from 1 to 8, inclusive, and 5 were $1,000 each and were numbered from 1 to 5, inclusive. I think there were 60 coupons attached to each bond. The bonds were all printed at that time in one book. The bonds were actually signed, but my name was lithographed upon the coupons.

Aug. 19th I was authorized to sign*ed* the coupons. The signature to the coupons is a fac-simile of my signature.

The $9,000 of bonds were delivered at that time to the treasurer of the company. He was then acting as treasurer. We took a receipt from him. The commissioners met with the president of the company Dec. 2d, 1871. No bonds were then signed and delivered.

Dec. 6th, 1871, we issued and delivered $24,000 to Thomas Cornell, president of the company, numbered 1 to 30 of $100, inclusive; from Nos. 9 to 28, inclusive, of the $500, and from 6 to 16, inclusive, of the $1,000. I took a receipt at the time.

Didn't issue any more till June 13th, 1872—$3,000; cannot give

the numbers; issued to W. W. Grant, treasurer, and I took a receipt from him.

July 11th, 1872, issued $4,500 to W. W. Grant, treasurer. I think all of those bonds were signed by the three commissioners and had coupons attached with my name lithographed upon them; August 12th, 1872, delivered $10,200 to W. W. Grant. The bonds were numbered as they were issued and the coupons were numbered to correspond to the bonds.

	September 11th, 1872, delivered	$8,000
46	October 8th, 1872, delivered	12,000
	October 17th, 1872, delivered	8,000
	November 7th, 1872, delivered	17,000
	December 10th, 1872, delivered	2,300

All delivered to W. W. Grant, treasurer: that was all of the bonds issued.

Dec. 17th, 1872, we settled up with the company and received the certificate of stock shown me. There was a written agreement made with Jas. H. Graham.

The bonds were to be exchanged for stock at par. Ward Grant was president and S. H. White secretary and treasurer at that time. I kept the stock and delivered it to my successor in office.

Paper shown me was delivered to me about the time it bears date by Smith H. White, acting county clerk.

Certificate of stock dated Dec. 17th, 1872, certifying that town of Andes, Delaware county, New York, was entitled to 980 shares of $100 each in the capital stock of the Delhi and Middletown Railroad Company, signed by W. Ward Grant, president, and Seth H. White, secretary and treasurer of said company, offered in evidence by plaintiff.

There were just $98,000 of blank bonds printed; there — 300 of the $100 bonds, numbered from 1 to 300; there — 76 of $500, numbered from 1 to 76, and 30 of the $1,000 bonds, numbered from 1 to 30. I took all but $9,000 of the bonds to the county clerk's office to be registered. The $9,000 were sent there. I think I saw them at the clerk's office.

47 In 1873 the commissioners received from James S. Scott, supervisor of the town of Andes, the sum of $5,000, and that money, with the money in the hands of the commissioners from the year before, made up the interest for that year. The coupons for that year were paid. The annual interest on the bonds was paid each year while I was commissioner, and the coupons were returned to the commissioners cancelled.

The defendant offered the cross-examination of the witness as follows:

There was just a book containing $98,000 of blank bonds. They were printed in either the city of New York or Albany. I never signed any coupons myself. I do not think there was any written authority from my co-commissioners for me to sign the coupons to

the bonds. The bonds were not signed by all three of the commissioners until we were ready to deliver them to Mr. Grant, and they were thus signed and delivered to Mr. Grant at the times and in the amounts specified in our book of minutes.

November 16th, 1871, we delivered 8 of the $500 bonds, numbered from 1 to 8, inclusive, and five of the $1,000 bonds, from 1 to 5, inclusive.

December 6th, 1871, we delivered to Mr. Grant 30 of the $1,000 bonds, from 1 to 30, inclusive; 20 of the $1,000, from 8 to 28, the latter inclusive, and 11 of the $1,000, from 5 to 16, the latter inclusive.

June 13th, 1872, we delivered to Mr. Grant 6 of the $500, from 28 to 34, the latter inclusive. We have no record of the number of the bonds after that that were issued, except on the stubs of
48 the bond book. That book I have not in my possession. That book would show the dates of issue and number of the bonds. Whatever subscription we made to the stock of the company was in writing. I think it was a piece of paper we signed. It was not a subscription book. It was in Judge Wagner's office that we subscribed the paper. S. H. White had it there. At that time James H. Graham was president of the company. When we subscribed to the stock Mr. Graham gave us a paper.

It is conceded that the following is a copy of the paper referred to:

It is hereby understood by and between Andrew Hawver, John D. Dickson, and Andrew Armstrong, commissioners of the town of Andes, and James H. Graham, president of the Delhi and Middletown railroad, that the bonds of the town *fo* Andes and the avails of the same are only to be expended and used for the construction and equipment of said road in and through the town of Andes.

Dated Delhi, May 22d, 1869.

(Signed) ANDREW HAWVER,
ANDREW ARMSTRONG,
JOHN DICKSON,
Commissioners of the Town of Andes.
J. H. GRAHAM, *Pres.*

Defendant offers the above paper in evidence; received.

The date is a mistake. It should be 1871 instead of 1869. I do not think that was the only paper I signed that day in Judge Wagner's office. I think I signed another paper, but am not positive. I never paid any interest directly on these bonds. The Delhi and Middletown Railroad Company was to run from Arkville or Deans to Delhi through the towns of Middletown, Andes, Bovina, and Delhi.

49 Question. So far as you know, Andes is the only town that has issued bonds for the road?

Answer. Yes, sir.

Question. Has this road ever been constructed and operated through the town of Andes?

Answer. No, sir; and no part of the road has ever been operated.

Neither myself nor my co-commissioners ever received any money on account of the sale of any of these bonds. On the 20 of November, 1871, none of these bonds had been signed by the three commissioners except $9,000.

Question. Did the commissioners refuse to issue any bonds unless the railroad company would guarantee that the proceeds of the bonds should be used in constructing and equip-ing the road in the town of Andes?

Answer. Yes. Mr. George E. Marvine afterwards was president of the company.

Question. Did he refuse to carry out this agreement with reference to the expenditure of the proceeds of the bonds in the town of Andes?

Answer. He refused to carry out the agreement as to the expenditure of the proceeds of the bonds in the town of Andes.

Plaintiff read in evidence the deposition of Seth H. White, of which the following is a copy:

SETH H. WHITE, called and sworn for the plaintiff, says:

I reside in Delhi and did in 1871, and was the secretary of the Delhi and Middletown Railroad Company from its organization. I was one of the directors of the company, and was present at a meeting of the board of directors, March 2d, 1871. I have in my hand the book of minutes of the Delhi and Middletown
50 Railroad Company. There is an entry in that book under the head of March 2d, 1871.

Plaintiff offers the entry in evidence.

Entry reads:

ANDES, *March 2d*, 1871.

At a meeting of the directors held at the hotel of F. V. Bishop, in Andes. Present, Thomas Cornell, James H. Graham, Judge Hathaway, G. G. Decker, Alex. Stories, W. B. Schafer, John Hilson, Lemuel Sines, W. W. Grant, Henry Dowie, S. H. White, R. Morse.

Report of engineer read.

Resolved, That the board of directors of the Delhi and Middletown railroad adopt the Tremperskill and Fish Lake or southern route, and do hereby locate their road on said route.

Adjourned till the call of the president.

That resolution was passed at that meeting.

I am familiar with the country over which the line of the road extends. I have seen the map or profile filed Mar. 4, 1871.

Question. Did that map locate the road by Lumberville and Shavertown and by the Andes village and by Fish Lake?

Answer. It does.

Question. State whether there was a change made the next year and what the change was.

Answer. It was changed from one side of the river to the other between Lumberville and Shavertown. I was at the office of the county judge of Delaware county on May 22d, 1871. The county

judge had a public office at the court-house in Delhi. James H. Davis was there before the county judge. I know that at that time he was a tax-payer of the town of Andes. He is the one who made an affidavit on the back of one of the petitions.

51 Question. Was evidence offered before the county judge?

Answer. There was evidence taken. The tax-roll of the town of Andes of the previous year was put in evidence. An order was made by the county judge and commissioners appointed. The three persons appointed commissioners were present in Delhi.

Question. After they were appointed did they subscribe for $98,000 of the stock of the Delhi and Middletown railroad?

Answer. They did so subscribe for $98,000 of the stock. The subscription was in writing. I had it. It is not in my possession. It was either in the subscription book or on a paper. I think they subscribed w-ere the other subscribers did, but I would not be positive about that.

Witness looks at Plaintiff's Ex. "E," J. M. P.

That is my signature—S. H. White, secretary and treasurer—and the signature of W. Ward Grant, president, is the genuine signature—W. Ward Grant—and that is the certificate that was delivered to the commissioners of the town of Andes. The certificate reads as follows:

"Shares of $100 each.

"DELHI AND MIDDLETOWN CO., } [SEAL.]
"*State of New York.* }

"No. 8. Delhi and Middletown Railroad Company. Shares, 980.

"This is to certify that the town of Andes, Del. Co., N. Y., is entitled to nine hundred & eighty shares in the capital stock of Delhi and Middletown Railroad Co., transferable only on the books of the company in person or by attorney on surrender of this certificate.

"Delhi, N. Y., Dec. 17, 1872.

52 "S. H. WHITE,
"*Secretary and Treasurer.*
"W. WARD GRANT, *President.*"

The railroad company done a large amount of work on this road. The company spent considerable over $200,000 on the whole line.

Question. How much of the whole amount expended was expended in the town of Andes, to the best of your recollection?

Answer. Nearly half.

Cross-examination read by defendant:

I was director, on the executive committee, and secretary and treasurer, and White and Jacobs were attorneys for the company.

Question. As attorneys for the company you had the principal charge of those bonding proceedings, so called?

Answer. I presume so. We were attorneys in the case and did

the business. The papers that are attached together that were presented by the clerk are in my handwriting, except the signatures. I charged the railroad company for a good many services. Whether I did in this particular matter or not do not now remember. The charges of White & Jacobs are in the register. I have a book of my own that has my charges against the company. (Defendant asks the witness to produce his book.) I did not keep any minutes of the witnesses sworn before Judge Wagner. Witness- were sworn.

Question. What witnesses were sworn?

Answer. I do not recollect who was sworn. Mr. Davis was there.

Question. Who did the work in the town of Andes?

53 Answer. Mr. Boice and Mr. Woolen. I do not know when work was commenced on the road. The company did not commence working on the line between Lumberville and Shavertown until after the change in the location between Lumberville and Shavertown. I don't know exactly w-ere the change of the line of the road extended. It was changed from Lumberville to Shavertown. I do not know that there was any work done on the road in the town of Andes before May 1st, 1872, when the line was changed. I think Thomas Cornell built the Union Grove bridge after Boice, Wolven and Co. stopped work under their contract. With the exception of the Union Grove bridge, I do not know of any work being done in the town of Andes, except that was done by Boice, Wolven and Co.

Defendant offers in evidence a resolution adopted at a directors' meeting held at Andes April 18th, 1872, which reads as follows:

"Resolved, That the executive committee be authorized to let the construction of the Delhi and Middletown railroad, in pursuance of the resolution of the board passed March 21st, 1872, to Messrs. Boice, Wolven & Brown, of Olive, on such terms and conditions as in their judgment will best subserve the best interests of the company."

The line of the road as delineated on the map is a mile or two out of the Andes village.

Redirect:

From the winter of 1871–'72 down to 1883 I was a private banker doing business in Delhi village, which is about 13 miles from Andes village.

54 Question. Do you know of certain of these bonds being bought and sold on the market down to 1882 at par?

Answer. Yes; the interest was paid on these bonds down to about 1882.

Recross-examination:

I bought some bonds of a man named Phyfe, in Andes. I sold some 70,000 of these bonds. I sold a good many of these bonds for the company for 90 cents on a dollar.

Redirect:

These that were sold for 90 cents was in the early part of the work.

SETH H. WHITE.

Sworn to and subscribed before me this 11th day of June, 1884, at Delhi, in said northern district of New York.

JONAS M. PRESTON,
Notary Public in and for Delaware County, New York.

Also testimony of the same witness, of which the following is a copy:

SETH H. WHITE, sworn for plaintiff, says:

I was secretary of the Delhi and Middletown Railroad Company during the whole time of its organization. I always had charge of the books and papers of the company. I delivered to Mr. Marvine, president of the company, such papers as he wanted. I refer to George E. Marvine. I never delivered any papers to any other person. Among the papers which I had was a subscription to the capital stock of the Delhi and Middletown Railroad Company. I have recently made diligent search among papers in my possession for the subscription paper to the capital stock of that company. I am not able to find it. I don't recollect seeing it for some years.

55 The subscription, as near as I can recollect, was an ordinary subscription to the capital stock of the company, signed by different subscribers. On May 22d, 1871, I saw John Dickson, Andrew Armstrong, and Andrew Hawver sign the subscription paper. They signed it as commissioners of the town of Andes for the sum of $98,000. I saw the paper frequently after that. It was on a sheet of paper. I have no knowledge of where it is now.

S. H. WHITE.

Subscribed and sworn to, at Delhi, in said northern district of New York, the 21st of October, A. D. 1884.

JONAS M. PRESTON,
Notary Public in and for Delaware County, State of New York.

Also his deposition taken in this action, of which the following is a copy:

SETH H. WHITE, sworn for the plaintiff, deposed as follows:

I was secretary of the Delhi and Middletown railroad; was a director and member of the executive committee. I remember the company receiving $98,000 of bonds of the town of Andes. The company sold all the bonds. They sold at not less than 90%, and some, I think, sold at par. These bonds were sold very soon after they were issued. I sold quite a number in 1872. They were sold as good and valid bonds. I was for about ten years thereafter a private banker, doing business at Delhi, N. Y. I knew of the bonds of Andes being bought and sold during that time, a great many of them, at par. The bonds were always sealed, as far as I remember. My recollection is that the bonds were all under seal. From 1875 to 1882 I remember the bonds being sold, some at par and some below. I never sold any at my bank below par.

56 Cross-examined:

The articles of association were drafted by me, I think. General Jacobs and I were law partners at that time. Different persons had the papers upon which the stockholders subscribed. I think I spoke to Judge Wagner, and my recollection is that he agreed to take one share. I don't think he signed, but I don't remember exactly. He changed his mind afterward and said he would not take it. That was some time before proceedings were taken to bond the town of Andes. I can't tell whether it was prior to the drafting of the articles of association. I think I filed the articles of association at Albany.

I don't know why his name was left in the articles of association. I think he must have notified me of his decision not to take the stock prior to filing the articles, and his name was not on the list of delinquents. I know some persons didn't pay. Duncan Ballantine didn't pay. We had issued no certificate of stock at the time of filing articles of incorporation. I think Judge Murray signed for stock and didn't take it. I know that no certificate of stock was ever issued to Judge Wagner; don't know as any one else ever took Wagner's share.

I was undoubtedly informed when I swore to the articles of association that ten per cent. had been paid in by the subscribers mentioned in the articles. E. D. Wagner, mentioned in the articles, is the same man who was the county judge before whom the bonding proce-dings were had.

57 I sold, as agent of the company, about $30,000 of these bonds. I negotiated and sold a number of others beside those for which I received the money. I sold $1,000 to James Stewart Dec. 10, 1872, at 90 %. I sold W. H. Griswold $3,000 at same price Dec. 10, 1872. I sold J. Stewart $6,000 more Dec. 13, 1872, at same price. I sold Duncan Ballantine $8,700 Dec. 17, 1872, at 90 %; same day I sold Cyrus Mead $2,000 at same price. On Jan. 8, 1873, I sold John T. Andrews, of New York, $3,000 at 90 %. On Jan. 15th, 1873, I sold J. P. Gould, the engineer of the road, $5,000 at 90 %. They were all paid for in cash. Mr. Gould paid cash for his. I acted for the company in selling these bonds. I was actively engaged in the bonding proceedings of the town of Andes. I appeared before Judge Wagner. I think the company owed me when they broke up. I was employed by them and charged them for attending to that business, but don't know how much. I was also employed by some Andes citizens. Henry Dowie was one; he was a director of the company. I can't remember who were present from Andes at that time. I dealt in the bonds at my bank same as I did in any negotiable paper. I recollect trading some even for Delhi bonds and I had paid par for the Delhi bonds. I never heard of any being sold for less than 90 %, and I guess none went over par; don't remember whether the bonds were all delivered to the company at one time or not. I took more of the bonds at the time I sold these and returned them to the company. I made an agreement with the Ulster County bank to sell the bank $10,000 of the

bond at 90 %, and I think they got them from the company; think I negotiated more, but I can't recall the names.

Direct examination resumed:

In those years I was dealing extensively in other bonds
58 and securities at Delhi, N. Y. 90 % was at that time considered a fair price for bonds and obligations having some time to run.

S. H. WHITE.

Sworn to before me this 15th day of August, 1890.

LAFAYETTE B. GLEASON,
Notary Public in and for Delaware County.

Plaintiff then offered in evidence the report of James Ballantine, supervisor, for 1881, and resolutions of the board of supervisors of Delaware county, of which the following is a copy:

Andes.

A tabular statement of the public debt of the town of Andes, Delaware county, N. Y.

The public debt of the town of Andes is ninety-five thousand dollars ($95,000), in the form of coupon bonds of the denomination of one thousand ($1,000), five hundred ($500), and one hundred ($100) dollars, with interest at the rate of 7 per cent., payable semi-annually, on the first days of March and September of each year.

Said bonds were issued by the railroad commissioners of the town of Andes by virtue of an act passed April 24, 1869, and acts amendatory thereof. The amount unpaid at the time of my election was ninety-five thousand dollars, none of which will mature during the ensuing year. The amount of interest maturing during the ensuing year is six thousand six hundred and fifty dollars ($6,650), for which a tax has been levied and assessed against the real and personal property of said town.

59 Dated November 10, 1881.

JAMES BALLANTINE,
Supervisor.

On motion of Mr. Ballantine the sum of $6,650 to pay the interest upon the railroad bonded debt of the town of Andes was levied on said town.

On motion of Mr. Gleason the board adjourned until nine o'clock Thursday morning.

All of which was objected to by defendant upon the ground that the supervisor could not by such report or resolution bind the town; which objection was overruled, and defendant excepted, and the same was received in evidence.

Subject to the same objection and exception, the record of the proceedings of said board of supervisors for 1880 *were* put in evidence, showing a similar resolution adopted on motion of the super-

visor of Andes and a similar report by him of the public debt of the town; also the record of the proceedings of the same board in each year from 1872 to 1879, inclusive, showing that the amount necessary to pay the interest was annually levied upon the taxable property of the town, and that in each year the supervisor of the town presented a report and certificate of the railroad commissioners of the town certifying the sum necessary to pay the interest falling due in each year.

And it was conceded that in February, 1882, the defendant, at its town meeting, decided to contest the validity of the said bonds, and since that time has refused to pay any of the coupons as they fell due, and that since February, 1882, no money has been deposited for the payment of the coupons.

Plaintiff next offered in evidence the testimony of EDWARD
60 W. SHAVER, as follows:

I am the town clerk of the town of Andes. I have the book of minutes of the town meetings of the town of Andes.

(Book produce-.)

Plaintiff offers in evidence from page 21 of the book of minutes the proceedings of the town board of the town of Andes, commencing Feb. 11, 1873, and the record of the special town meeting held June 6, 1874.

Defendant objects to it as immaterial and incompetent, and that the action of the meeting was unauthorized; that there is no proof that the meeting was authorized, and that the defendant is not bound by the action of that meeting.

The COURT: I will receive it.

Exception taken.

At a special town meeting held at Crispell's hall June 6, 1874, pursuant to an act of the legislature passed —— —, 1874, to vote on the following question: "Shall the railroad commissioners of the town of Andes be empowered to sell and transfer the stock of said town in the Delhi and Middletown railroad at their discretion?"

The whole number of votes received was two hundred and ninety, of which one hundred and twelve (112) were for and one hundred and seventy-eight (178) were against the same.

We, the members of the town board, do hereby certify that the above statement is true.

ROBERT M. HANMER,
HENRY DICKSON,
BENJ. CONNER,
Justices of the Peace.

JAMES A. McNEE,
Town Clerk.

61 Plaintiff offers in evidence page 25 of same book.
Same objection; same ruling; exception taken.

Statement of the result of a special town meeting held at Crispell's hall, in Andes village, May 14th, 1875, in accordance with an act of the legislature of the State of New York, passed April 24, 1875, authorizing the railroad commissioners of the town of Andes to sell the stock of the Delhi and Middletown Railroad Company belonging to the said town.

The whole number of votes cast at this meeting was three hundred and thirty-seven, of which three hundred and thirty-five were in favor of selling the Delhi and Middletown railroad stock and two were opposed to selling the Delhi and Middletown railroad stock.

We, the board of town auditors, do hereby certify that the above statement is correct and true.

Dated Andes, May 14th, 1875.

JAMES A. McNEE,
Town Clerk.
HENRY DICKSON,
ADAM SUTHERLAND,
WILLIAM C. LAING,
ISAAC E. HANMER,
Justices of the Peace.

PLAINTIFF'S COUNSEL: I now offer in evidence all the bonds referred to in the complaint except 18 and 19, of $1,000 each, which I am not able to offer.

The same were received and considered read in evidence, and, for the purpose of obviating the necessity of a further production of the said bonds, it was agreed that the testimony of the plaintiff's counsel with regard thereto should be taken as follows:

JOHN B. GLEASON, for the plaintiff, testified:

62 These bonds are all exact copies of the bonds set forth in the complaint except in number and amount and except that bonds numbers 42, 43, 44, 45, and 46, of $500 each, are without seals, but there are no coupons cut from these five bonds more than six years old. Six of these bonds, of $100 each, numbers 42, 43, 44, 45, 46, and 51, I have in my hands. The first five named are sealed. No. 51 has two seals. Nos. 42, 44, 45, and 46 have each one seal, with the plain appearance upon some of the bonds that the other seals have fallen off. No. 43 has at present no seals. All of the other bonds produced by me are under seal. The seals upon all of the bonds which I have examined are wafers, and I have noticed a number of them loose upon the bonds. I notice upon bond 43 the plain appearance of having been sealed—such an appearance as would be produced by wafers having been fastened upon the bond and having fallen off, leaving mucilage upon the bond.

Next the plaintiff proved that the plaintiff is a citizen of the State of Connecticut, residing at South Norwalk, Connecticut, and

that the plaintiff is the owner and holder of the coupons described in the plaintiff's complaint, except coupon No. 21, of $17.50, from bond No. 28, of $500. All the other coupons were produced by plaintiff's counsel and were received in evidence. The face amount of the coupons so received in evidence was $25,630.50.

As to all of said coupons, except those cut from bonds Nos. 24 and 25, of $1,000, and Nos. 87 and 156, of $100, and amounting to $1,232 of coupons, it was proved that the plaintiff's purchases were made after the coupons became due, and that the plaintiff, be-
63 fore he purchased any of said coupons, knew that the validity of the bonds and coupons was disputed by the town of Andes, and that the same were purchased by the plaintiff after the decision of the court of appeals in the State of New York in the case of Craig against The Town of Andes, reported in 93 New York, at page 405, and as to the remaining $1,232 of coupons its was conceded by the plaintiff that this action must be dismissed as to them for lack of jurisdiction, provided that it is dismissed as to the others for any cause.

Next the plaintiff proved that John Phyfe, *that* in the year 1874, *he* purchase-eight $100 bonds of the town of Andes, Nos. 52–56, 88, 216, and 217, being a portion of the bonds described in the complaint, and that he paid 97 and accrued interest for a part of them and par and interest for the remainder, believing them to be good bonds.

And the plaintiff proved by John W. Blair that he was the owner of $1,700 of the bonds described in the complaint, being 170, 201, 230, 231, 182, 184, 185, of $100, and Nos. 74 and 75, of $500, and that he received them from Thomas E. Hastings, his guardian, in January, 1888, on the settlement of his accounts as guardian. It was conceded that when the witness received the bonds he knew that their validity was questioned. The plaintiff proved by Thomas E. Hastings that he purchased the bonds before 1882 as security to hold as trustee in the J. J. Blair estate, and that he paid for them the face and accrued interest.

The plaintiff proved by the deposition of Mary Douglas that she purchased $2,100 of the bonds described in the complaint at par before their validity was questioned, being Nos. 89, 154, 155, 173, 187, 189, of $100, and Nos. 55, 56, and 62, of $500.

64 The plaintiff proved by the testimony of John A. Kemp that he was supervisor of the town of Delhi, and that the town has a sinking fund, and that in that fund are $3,000 of the bonds of the town of Andes, being a portion of the bonds described in the complaint, and that the same were purchased April 4th, 1878, at par and accrued interest, being Nos. 3, 7, 16, and 21, of $500 each, and Nos. 1 to 10, of $100 each.

Plaintiff offered in evidence the deposition of SAMUEL R. RAINEY as follows:

I reside at Hudson, N. Y.; am the secretary and treasurer of the Hudson City Saving Institution, and acting as such.

Q. Was that bank at one time the owner or holder of certain in-

struments purporting to be the bonds of the town of Andes, Delaware Co., N. Y., dated Sept. 1, 1871, and signed by Andrew Armstrong, John Dickson, and G. R. Shaver?

A. I don't know who they were signed by. We held bonds of that date of the town of Andes.

Q. What were the numbers and denominations of those bond-?

A. Nos. 21, 22, 27, 30 ..... $1,000 each.
Nos. 57 to 73, both inclusive ..... 500 "
" 31, 32, 71, 72, 73, 74, 75 ..... 100 "
" 81 to 86, inclusive ..... 100 "
" 90 to 98 " ..... 100 "
" 157 to 164 " ..... 100 "
" 166, 167, 169 ..... 100 "
" 171, 172 ..... 100 "
Nos. 175 to 181, inclusive ..... 100 "
65 " 183, 190, 194, 204, 207, 208, 215, 218, 219, 220, 224, 233, 234, 236, 238, 241, 242, 246, 248, 249, 250, 254, 257, 259, 261, 262, 265, 267, 268, 269, 274, 277, 278, each 100
No. 23 1,000
" 32 500
" 48 500
" 50 500
" 51 500
" 58 500
" 59 500
" 60 500
" 61 500
" 26 1,000
" 57 500
" 64 500
" 65 500
" 66 500
" 188 100
" 209 100
" 211 100
" 212 100
" 214 100
" 228 100
" 243 100
" 244 100
" 247 100
" 258 100
" 260 100
No. 264 100
66 " 289 100
" 290 100
No. 292 100
" 294 100
" 295 100
" 296 100

No. 297		$100
" 298		100
" 299		100
" 300		100
" 202, 252, 270		100 each.

(It is admitted that the foregoing bonds are of the form substantially as set forth in the complaint in this action and signed by the persons as therein mentioned.)

They were purchased for us as follows:

$15,000 by the Nat'l Hudson River Bank of Hudson, N. Y., from the 1st National Bank of Andes.

$5,000 purchased by us from George B. Fairshild.

$5,500 purchased for us by the Nat'l Hudson River bank from the 1st National Bank of Andes.

The date of the $15,000 purchase was May 7, 1880; that of $5,000 was May 8, 1880, and that of $5,500 was June 1, 1880. There was another purchase of $300 made June 2, 1880, of the 1st Nat'l Bank of Andes through the Hudson River bank.

We paid for these as follows:

The $15,000	cost	$15,194.49.
The $5,000	"	5,467.00.
" 5,500	"	5,600.25.
" 300	"	305.75.

Plaintiff offered in evidence the deposition of George H.
67 Millard, as follows:

"GEORGE H. MILLARD, being sworn for plaintiff, deposed as follows: I reside in Delhi; am a private banker and have been for some years. I bought $2,000 of Andes bonds of Mr. White March 27th, 1879; numbers 24 and 25. I paid par and interest and cash. I have lived in Delhi all my life. I bought the bonds as an investment; had not heard their validity questioned and considered them perfectly good.

Cross-examined:

I sold these bonds very soon after the injunction in the Calhoun case was dissolved. I sold them to Dudley P. Ely, of South Norwalk, Conn. I sold them for par and interest for cash. I guaranteed them. I did not inform him as to the litigation, but guaranteed them and sent them on. I presume I notified him afterwards, but at the time he paid for the bonds he didn't know of the action. He is my father-in-law and president of the Norwalk bank."

Plaintiff offered in evidence the deposition of Edwin D. Wagner, as follows:

"EDWIN D. WAGNER, sworn for the plaintiff, deposed as follows: I reside in Delhi. I was county judge of Delaware county in 1871. I was never a stockholder in the Delhi and Middletown Railroad Company.

Cross-examined:

I was not one of the original incorporators and was not mentioned as such in the original articles of incorporation to my knowledge. I don't think I ever signed any articles. I signed for one share of stock, and the next day I stated to the person with whom I
68 took the stock that I would not take it, and he agreed to take my name off. I don't know who it was, and I can't tell as I signed my name or not. I know I saw the proper person and canceled my agreement to take the stock, and I never took it; it was agreed that I should not. I think it was the same person I saw first when I made the agreement. The bonding proceedings of the town of Andes were had before me as county judge. The talk as — my taking stock was some time before the proceedings were had before me. The certificate of stock was never tendered or offered to me."

Plaintiff gave in evidence a computation of the amount of ac-rued interest upon the coupons offered in evidence from the times in which they respectively fell due, amounting to $6,722.13, making the total amount of the coupons in controversy, with interest, $32,352.63.

The plaintiff here rested.

Defendant then read from the printed testimony of George T. Warner, taken April 30, 1884.

GEORGE T. WARNER called and sworn and examined by Mr. MAYNARD, testified as follows:

I am the county clerk of Delaware county; I have been in the office something over 8 years, but cannot tell exactly; I have examined the records or files of my office for the papers relating to the bonding of the town of Andes; I have the petitions and the judgment roll called for; I will produce them (papers produced).

Defendant offers petitions in evidence.

Petitions received, of which the following are copies:

To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town of Andes,
69 county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition and say that we are such a majority of tax-payers and represent such majority of taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize the formation of railroad corporation- and to regulate the same, passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and as-

sessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi and Middletown Railroad Company, an association formed in said county and State, on condition that said road is located by Fish lake and Shavertown.

November 23rd, 1870.

JOHN D. IMRIE.
ADAM SUTHERLAND.
JOHN McGIBBON.
ESTATE OF ALEXANDER MORE,
By ELIZABETH MORE.
JOHN HOLMES.
GEORGE R. SHAVER.
ESTATE OF NATHANIEL BIRCH, DEC'D,
By MRS. MARY KEATOR.
WILLIAM SCOTT.
NICHOLAS LAMBRECHT.
F. C. RESIDE.
BENJAMIN HUNT.
AARON O. SCUDDER,
Per W. W. GRANT.

GEORGE SHAW.
JAMES MARSHALL.
JAMES P. KING.
ARCHIBALD McNAUGHT.
ANDREW ANDERSON.
WILLIAM RICKLETON.
NOAH B. HAMILTON.
JAMES WHITSON.
JOHN H. WOODEN.
JOHN BRAMBLEE.
WALTER ARMSTRONG.
ALEX. McQUEEN.
W. D. WICHAM.
PATRICK CARROLL.
S. G. ACKERLY.
her
MARY x AKERLY.
mark

70

JOHN McNAIR.
THOMAS H. LIDDLE.
EDWARD CAROLL.
CATHERINE RACE.
SAMUEL GREGORY.

ROBERT McNAIR.
ROBERT BLEAKIE.
SYLVESTER GAVITT.
JOHN McLEAN.

(Endorsed :) " No. 1. Filed May 6th, 1871."

To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition and say that we are such a majority of tax-payers and represent such a majority of taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the act entitled " An act to amend an act entitled An act to authorize the formation of railroad corporations and to regulate the same, passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable propert- as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the

stock of the Delhi and Middletown Railroad Company, an association formed in said county and State.

71 November 23d, 1870.

WILLIAM GOWANLOCK.
GEORGE K. GLADSTONE.

(*D*ndorsed:) "No. 2. Filed May 6th, 1871."

To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition and say that we are such a majority of tax-payers and represent such a majority of taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand *thousand* dollars (98,000) in accordance with the provisions of the act entitled "An act to amend An act entitled an act to authorize the formation of railroad corporations and to regulate the same, passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads" passed May 18th, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi and Middletown Railroad Company, an association formed in said county and State.

November 23d, 1870.

WILLIAM H. VAIL.
JOHN NEISH.

(Endorsed:) "No. 3. Filed May 6th, 1871."

72 To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or represneting a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition and say that we are such a majority of tax-payers and represent such a majority of taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize the formation of railroad corporations and to regulate the same, passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole

amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi and Middletown Railroad Company, an association formed in said county and State, on condition that said road is located by Fish lake and Shavertown or village.

November 23d, 1870.

ALEX. SHAW.
ANDREW ARMSTRONG.
THOMAS HYZER.
LORENZO D. TERRY.
WM. S. DOIG.
ALEXANDER SHAW.

(Endorsed:) "No. 4. Filed May 6th, 1871."

73 To the county judge of Delaware county, State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge by petition and say that we are such a majority of the tax-payers and represent such a majority of taxable property, and we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize the formation of railroads corporations and to regulate the same, passed April 2nd, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi and Middletown Railroad Company, an association formed in said county and State, on condition that said road is located by Fish lake and Shavertown.

November 23rd, 1870.

ANDREW GLENDENING. JOSHUA NORTHUP.
CALEB MONROE. ALMIRETTA LAIDLAW.

(Endorsed:) "No. 5. Filed May 6th, 1871."

74 To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town of Andes, county — Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition and say that we are such a majority of the tax-payers and represent such a

majority of taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars (98,000) in accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize the formation of railroad corporations and to regulate the same, passed April 2nd, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi and Middletown Railroad Company, an association formed in said county and St*ste*.

November 23d, 1870.

R. M. HANMER.
ANTHONY BROWER.
DAVID G. JENKINS.
JOHN GREGORY.
SAMUEL B. SHAVER.
A. J. BARNHART.
LEWIS MINER.
AB'M MANN.
ABRAM L. VAN STEENBURGH.
HENRY WHITNEY.
GEO. H. VAN STEENBURGH.
THOMAS HOLT.
JOHN WHITNEY.
WALTER WARREN.
JAMES A. HUNTLEY.
ALBERT HITT.
JAMES JENKINS.
ALONZO JENKINS.
SAMUEL H. REED.
MILES WARREN.
AND. MEKEEL.
ANSON JENKINS.
LEANDER BARNHART.
WILLIAM H. VAN STEENBURGH.
J. EDMUND SAMUELS.

75 HYRAM (his x mark) JENKINS.

(Endorsed:) "No. 6. Filed May 6th, 1871."

To the county judge of Delaware county an- State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition and say that we are such a majority of tax-payers and represent such a majority of taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize the formation of railroad corporations and to regulate the same, passed April second, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi

and Middletown Railroad Company, an association formed in said county and State.

November 23d, 1870.

JOHN WHITNEY.
JOHN T. HADDOW.
76 WM. A. HADDOW.
JAMES DAVIS.
JANE R. ROBSON.
JAMES A. SHAVER.
D. B. SHAVER.
JAMES NEISH.
JONA. T. HOTCHKISS.
N. Y. SHAFER.
RICHARD E. HITT.
WM. GARRICK.
LEWIS BUSSEY.
J. J. NORTHRUP.
GEORGE DOUGHERTY.
JAMES W. SCOTT.
A. CAMPBELL.
JAMES GRAY.
JOHN ROBSON.
ROBERT McFARLANE.
J. R. NEWKIRK.
W. C. LAING.
ALEX. B. DOUGLAS.
WILLIAM R. ACKERLY.
ROBERT FLETCHER.
G. W. SHAVER.
DAVID TUTTLE.
JOHN FOWLER.
PHILLIP ALLEN.
WILLIAM R. WHITNEY.
HASBROUCK SHAVER.
PETER H. SHAVER.
LEWIS TITCH.
JOHN CARMAN.
JOHN G. CAIRNS.
WALTER K. MILLER.
JAMES CROSIER.
MICAIAH CORBIN.
MILLER & LAIDLOW.
HARRY DOWIE, JR.
JOHN BECKWITH.
GEORGE POTTS.
I. J. HUGHES.
JAMES MUIR.
MRS. MARY A. BRAMLEY.
her
ELIZABETH x BARNHART.
mark.

In presence of—
C. CARMAN.

(Endorsed:) "No. 7."

DELAWARE COUNTY, *ss:*

James H. Davis, being duly sworn, says that he — one of the petitioners mentioned in the foregoing application; that he has read the said application and knows the contents thereof, and that the same is true of his own knowledge, except the facts therein stated on information and belief, and as to those facts he believes it to be true.

JAMES H. DAVIS.

Sworn and subscribed before me this 6th day of May, 1871.

——, ——.

Filed May 6th, 1871.

To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding

tax-list or assessment-roll of said town as owning or repre-
77 senting a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition and say that we are such a majority of tax-payers and represent such a majority of taxable property, and that we desire that such town shall create and issue its bond- to the amount of ninety-eight thousand dollars ($98,000) in a accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize the formation of railroads corporations and to regulate the same, passed April 2nd, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi and Middletown Railroad Company, an association formed in said county and State.

November 23d, 1870.

W. B. SHAFER.	GODFREY TITCH.
McCABE & CO.	EDWIN R. RUSSELL.
ANDREW A. BARNHART.	MATHEW LAMBRECHT.
JAMES M. WILSON.	PATIENCE DAVIS.
L. D. JACKSON.	HENRY S. SHAFER.
CATHARINE SUTTLE.	H. WILSON.
JAMES SEATH.	HAWLEY RUSSELL.
L. SHAFER.	MADISON McFARLAND.
TITCH & SHAFER.	MADISON VANDUSEN.
MARY MUNGLE.	JAMES M. FINKLE.
HENRY H. JAGGER.	JOHN W. McCABE.

(Endorsed:) "No. 8. Filed May 6th, 1871."

To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or repre-
78 senting a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition and say that we are such a majority of the tax-payers and represent such a majority of taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize the formation of railroad corporations and to regulate the same, passed April 2nd, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same

or the proceeds thereof in the stock of the Delhi and Middletown Railroad Company, an association formed in said county and State.

November 23d, 1870.

CHARLES T. SHAVER.	EZRA SHAFER.
his	AUGUSTUS NEIDIG.
JOHN A. x SHAVER.	JAMES M. SHAVER.
mark.	JOHN CRAIG.
WOOLEY SHAVER.	MALLISSA D. SPRAGUE.
LEWIS KNAPP.	ELIZABETH BARNHART.

(Endorsed:) "No. 9. Filed May 6th, 1871."

79 To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition, and say that we are such a majority of tax-payers and represent such a majority of taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize the formation of railroad corporations and to regulate the same, passed April 2nd, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18t-, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi and Middletown Railroad Company, an association formed in said county and State.

November 23d, 1870.

WM. WHYTE.	JOHN GLADSTONE.
ALEXANDER LAIDLOW.	GEORGE DOUGHERTY.

(Endorsed:) "No. 10. Filed May 6th, 1871."

To the county judge of Delaware county, State of New York:

80 We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge by petition, and say that we are such a majority of the tax-payers and represent such a majority of taxable property, and we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize the formation of railroad corporations and to regulate the same,

passed April 2nd, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi & Middletown Railroad Company, an association formed in said county and State.

November 23d, 1870.

G. A. FRISBEE.
JOHN McNAIR.

(Endorsed:) " No. 11. Filed May 6th, 1871."

To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the
81 tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition, and say that we are such a majority of tax-payers and represent such a majority of taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000), in accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize the formation of railroad corporations, and to regulate the same, passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi & Middletown Railroad Company, an association formed in said county and State.

November 23d, 1870.

SIMON JACKSON.
PETER DICKSON.
ANSON BRACE.
T. V. BISHOP.
WM. B. SHAVER.
CHAS. CARMAN.
ARCH'D SHAW.
O. E. MINER.
E. W. BRACE.
A. T. RAITT.
A. HITT.
JOHN WOOD.
ROBERT BRISBANE.
JOHN HOGG.
MADISON HAWVER.
C. H. TIDD.
MARETTA MUIR.
ANDREW JERSEY.
SAMUEL DAVIS.
JEHEIL RACE.
ALEXANDER GRANT.
CHARLES F. LAING.
JOSEPH MURPHY.
NELSON HUTCHINS.
NOAH DAVIS, Jr.
ALEX. FURGUSON.
CALVIN MADISON.
F. M. PARISH.
IRA HALL.
JANETT MILLER.
MALCOLM MONROE.
DANIEL REYNOLDS.
WM. HILTON.
A. E. SCUTT.
A. S. DOWIE.
R. O. GLADSTONE.

THOMAS TAYLOR.
WILLIAM MUNGLE.
82 PETER McNAIR.
R. H. LAING.
JAMES H. WASHBURN.
JOSEPH DAVIS.
C. HULL.
JOSEPH B. DREYFUS.
RODERICK THOMPSON.
HENRY FEILD.
CHARLES BRACE.
RICHARD WOOLSEY.
GEO. N. CLINTON.
BRYSON BRUCE.
JAMES A. McNEE.
S. D. HILTON.
AARON A. SHAVER.
ANDREW HAWVER.
J. D. REYNOLDS.
JOHN ADEE.
TOWNSEND SHAVER.
EDWARD W. SHAVER.
FRANCES HEINER.
EDWIN WOODEN.
JOHN E. GLADSTONE.
JOSEPH FINKLE.
HARRIET MURPHY.
ABRAM BUSSEY.
A. McLAN.
ISAAC SAMUELS.
THOMAS LIDDLE.
JOHN E. LIDDLE.
LYDIA D. MORE.
HENRY REID.
JAMES E. BRACE.
DELOS C. SHAVER.
LUKE MURPHY.
JOHN G. KING.
EZRA S. DUMOND.
ROBERT CROSIER.
WM. A. HULL.
GEORGE ELLIOTT.
SAMUELS & FRANKLIN.
WILLIAM T. ALEXANDER.
MATHEW S. McCABE.
RICHARD MORSE.

(Endorsed:) "No. 12. Filed May 6th, 1871."

To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition, and say that we are such a majority of tax-payers and represent such a majority of taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize the formation of railroad corporations, and to regulate the same, passed
83 April 2nd, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi & Middletown Railroad Company, an association formed in said county and State.

November 23d, 1870.

WILLIAM OLIVER.
H. H. ROTERMOND.
JOHN DICKSON.
ADAM L. COWAN.
JOHN JACKSON.
PETER G. BOYES.
H. G. DOWIE.
JAMES DICKSON.
T. S. MILLER.
ELLIOTT GRAHAM.
W. B. DOWIE.
HENRY DICKSON.

(Endorsed:) "No. 13. Filed May 6th, 1871."

To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town — Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition and say that we are such a majority of the tax-payers and represent such a majority of the taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize the formation of railroad corporations and to regulate the same,
84 passed April 2nd, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi & Middletown Railroad Company, an association formed in said county and State. Above conditions shall be null and void unless said road shall be located by Shavertown and Lumberville.

November 23d, 1870.

JOHN A. RUSSELL.	W. B. SHAFER.
D. B. BEARDSLEY.	IRA WEAVER.
G. R. SHAVER.	ELI F. FELTON.
WM. MOSHER.	BEATIE HAMILTON.
MARY EDWARDS.	IRA W. HYZER.

(Endorsed:) "No. 14. Filed May 6th, 1871."

To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition and say that we are such a majority of tax-payers and represent such a majority of taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize
85 the *the* formation of railroad corporations and to regulate the same, passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds

thereof in the stock of the Delhi & Middletown Railroad Company, an association formed in said county and State.

November 23d, 1870.

ISAAC FLETCHER.	HENRY DOWIE.
JOHN O. LIDDLE.	JAMES A. LIDDLE.
SOLOMON BUSSEY.	PETER N. BASSELT.
RODERICK THOMPSON.	JOHN MILLER.
ALEXANDER LIDDLE.	J. O. LIDDLE.

(Endorsed:) "No. 15. Filed May 6th, 1871."

To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition and say that we are such a majority of tax-payers and represent such a majority of taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the act entitled "An act to amend an act entitled An act to au-
86 thorize the *the* formation of railroad corporations and to regulate the same, passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi & Middletown Railroad Company, an association formed in said county and State.

November 23d, 1870.

JAMES MURDOCK.	AARON MEKEEL.
JAMES B. CLAYTON.	JAMES REED.
E. R. SLATER.	ALEXANDER SHAVER.
DANIEL G. BARNHART.	P. SCUDDER.

(Endorsed:) "No. 16. Filed May 6th, 1871."

To the county judge of Delaware county and the State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby make application to the county judge of said county by petition, and say that we are such a majority of tax-payers and represent such a majority of taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the

act entitled an "Act to amend an act entitled An act to au-
87 thorize the formation of railroad corporations and to regulate the same, passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi and Middletown Railroad Company, an association formed in said county and State.

November 23d, 1870.

PETER KING. DANIEL KING.
JAMES REYNOLDS. DAVID CLAPPERTON.

(Endorsed :) " No. 17. Filed May 6th, 1871."

The following letter was pinned to petition No. 17:

GRIFFIN'S CORNERS, *January 6th*, 1871.

James Murdock, Esq.

DEAR SIR: In regard to bonding the town of Andes for a road I have no objection, as I was always in favor of improvement, but consider your estimate in the value of Lela place, if the road runs through, mere flattery. However, you can use my name if you choose.

Yours truly, P. SCUDDER.

To the county judge of Delaware county, State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a
88 majority of the taxable property in the limits of said town, hereby make application to the county judge by petition, and say that we are such a majority of tax-payers and represent such a majority of taxable property, and we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the act entitled "An act to amend an act entitled An act to authorize the formation of railroad corporations and to regulate the same, passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18th, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi & Middletown Railroad Company, an association formed in said county and State.

November 23d, 1870.

JAMES A. HUNTLEY. ADAM S. AKERLY.
his THOMAS S. BURROW.
JARVIS x MULNIX. ABRAHAM BARNHART.
mark. E. S. WASHBURN.

Witness:
JAMES A. HUNTLEY.
G. F. SUTTLE.

(Endorsed:) "No. 18. Filed May 6th, 1871."

To the county judge of Delaware county and State of New York:

We, the undersigned, tax-payers of the town of Andes, county of Delaware and State of New York, being a majority of the tax-payers of said town, whose names appear upon the last preceding tax-list or assessment-roll of said town as owning or representing a majority of the taxable property in the limits of said town, hereby
89 make application to the county judge of said county by petition, and say that we are such a majority of tax-payers and represent such a majority of taxable property, and that we desire that such town shall create and issue its bonds to the amount of ninety-eight thousand dollars ($98,000) in accordance with the provisions of the act entitled "An act to amend an act to authorize the formation of railroad corporations and to regulate the same, passed April 2d, 1860, so as to permit municipal corporations to aid in the constructions of railroads," passed May 18th, 1869, three-fifths being present (said amount not to exceed twenty per cent. of the whole amount of taxable property as shown by said tax-list and assessment-roll), and invest the same or the proceeds thereof in the stock of the Delhi & Middletown Railroad Company, an association formed in said county and State.

November 23d, 1870.

A. A. GRANT.	PHILIP FORD.
JOHN CRAIG.	DAVID CRAIG.
PETER KING.	M. NORTHRUP.
JOHN CHRESTENSEN.	JOHN McGREGOR.
ESTHER BASSETT.	JAS. McNAIR.
J. K. HOOD.	JOHN T. REYNOLDS.
LUCY A. DOWIE.	D. BURROUGHS.

(Endorsed:) "No. 19. Filed May 6th, 1871."

(Witness continues:)

Each one of these papers appe-r to be endorsed with number commencing with one and ending at nineteen, and also "filed May 6th, 1871." The number of the petition is in the handwriting of W. W. Grant, then county clerk. The words "filed May 6th, 1871," are in the handwriting of Judge Wagner. There is no endorsement on them of any filing by any county clerk; not on
90 each of the petitions.

The COURT: I think that he stated that the word (No.) and the figure (one) and also all the numbers on all the petitions are in the handwriting of the then county clerk.

—. Yes, sir; the words "filed May 6th, 1871," are in the handwriting of the then county judge. There is no other endorsement or filing on them.

Q. Do you know that at that time Mr. Grant was the vice-president or was an officer of the railroad company?

—. I know personally that he was, but there is nothing in the office to show that fact, that I am aware of. He was then acting as

the officer of the Delhi and Middletown Railroad Company. I have the order of May 6th, 1871, with notice of publication, and the notice.

Question. In whose handwriting is the notice?

Ans. It appears to be in the handwriting of Mr. Seth H. White, and the order for the publication of the notice is in the same handwriting.

Notice and order offered in evidence, received, and notice was marked "B," order marked "C."

Copy of notice found at folio 25 of this bill of exceptions.

Copy of Exhibit C found at folios 26 & 27 of this bill of exceptions.

Witness resumes:

I have the affidavit of Bryson Bruce.

Affidavits of Bryson Bruce offered in evidence by defendants.

Received and marked "D," a copy of which is found at folios 28 & 29 of this bill of exceptions and which is (endorsed) filed May 22nd, 1871. Edwin D. Wagner, county judge.

91 Witness continued as follows: The affidavit is in the handwriting of Mr. White. The notice is printed.

Question. Do you know that Mr. White was a director of the Delhi and Middletown Railroad Company?

Ans. I suppose he was at that time. He was represented to be. He was, to the best of my knowledge and belief. I have the order purporting to have been made by Judge Wagner.

Said order offered in evidence, received, and marked "E," copy of which is found at folio 30 of this bill of exceptions.

Witness continues: I have other papers here—the balance of the papers contained in the judgment-roll, so called, which was entered at that time.

Witness continues: These comprise all the papers I found on file relating to the matter. Those papers are all attached together, but there are other papers on file there—that is, the bonds and oaths of these men in addition to some subsequent appointment. This is simply the judgment-roll. The endors-ments upon that are "In the matter of the bonding of the town of Andes, Delaware county, for the Delhi and Middletown railroad." The endorsement is in the handwriting of Mr. Seth H. White. The words "Filed May 22d, 1871—5 p. m." is in the handwriting of R. A. Grant, who was then deputy. When I first descovered these papers the petitions were with them. They were in that way (indicating). They were not attached. They were in that situation when I first descovered them in my office. That was 5 or 6 years ago, and perhaps 8 years ago. I have made a search in my office to ascertain whether any judgment was ever entered. I find in the book which was kept called the "judgment book" there was an entry made. I have not the book here. I found two entries. I found the docket of the judgment and also an entry in the judgment book.

92 Witness produces judgment book and, turning to entry, reads: "In the matter of bonding the town of Andes, Delaware county, for the Delhi and Middletown railroad. Damages, $98,000." Under the head of "Determination of action," "order of county judge." Under the head "Rolls when filed," "1871, May 22d, 5 p. m." Under the head of "Attorneys," "White & Jacobs." There is nothing else. This is the only judgment book that was kept at that time. They did not record the judgment at length in the office at that time. It is the only judgment book that I know anything of for that period, and the only entry of any judgment in this matter that I can find is the one I have read from this book and docket; but the one from the docket I have not read.

Cross-examination by Mr. GLEASON:

These papers I have produced purporting to be since the adjudication were in the pigeon-hole of the clerk's office when I first discovered them, filed where papers and judicial proceedings are filed and judgments-rolls, and they were all wrapt in together, and upon the outside is the filing of the county clerk.

(Redirect:)

I do not wish to be understood as saying that W. W. Grant was county clerk. 1870 was the last year Mr. Grant was county clerk. He was not county clerk in 1871. Smith H. White was county clerk when these petitions were filed.

Cross-examined by Mr. GLEASON:

Ransom Grant was deputy clerk. The office of the county judge in 1871 was in this building, down-stairs, I sup-ose, and the office of the Delaware county judge has always been in the court-house of Delaware county.

Defendant then read the evidence of the same witness taken Oct. 21, 1884.

I have here the map and profile of the Delhi and Middletown Railroad Company. (Map produced.)

93 Question. Was that map and profile filed in the office of the county clerk?

Ans. It was filed March 4th, 1871. I think there are some certificates of the location. There is one showing the line runs in such a direction so many feet and in another so many feet. Here is a certificate of the profile, which reads as follows:

"Map of the Delhi and Middletown railroad; scale 400 feet per inch; J. P. Gould, chief engineer" (profile attached).

We, the undersigned, being the president and chief engineer of the Delhi and Middletown Railroad Company, do hereby certify that this is a correct map and profile of the road intended to be adopted by the said company for their road connected with Rondout and Oswego railroad on the land of J. H. Dean, in the town of

Middletown, and extending to the village of Delhi, all in the county of Delaware and State of New York.

J. H. GRAHAM, *President.*

J. P. GOULD,
Chief Engineer.

Endorsed: "Filed March 4th, 1871."

There is also written on the inside: "Filed March 4th, 1871." Further endorsed: "Map and profile of the Delhi and Middletown railroad."

When I first saw the map there was one roll inside the other. There are two rolls. One of them is filed May 1st, 1872, and the other March 4th, 1871. The one filed May 1st, 1872, is marked Delhi and Middletown railroad, map of the location from Lumberville to Shavertown. The map filed March 4th, 1871, is a very large map. I have examined that map. I find Lumberville on the map. I find Shavertown and squares marked on the map. I find the words "opposite Andes village" on the map. I find
94 "Fish lake" delineated on the map; and the railroad is represented as running past these places. I find on the map—this roll of map marked "Map of location from Lumberville to Shavertown" is filed May 1st, 1872, and the larger map is filed March 4th, 1871. When I first saw these maps, which was 8 or 9 years ago, the smaller was rolled inside the larger map. I do not know in whose handwriting the filing of May 1st, 1872, is.

Witness looks upon larger map and states that he finds opposite William H. Dickson the following: "Line is changed from here to Shavertown." See amendment on file and a star indicating the point. (Witness looks upon larger map.) The map indicates that the line of railroad all the way from Lumberville to Shavertown is the northerly side of the river.

Witness looks at the smaller map filed May 1st, 1872; says the line of the road on this map extends all the way from Lumberville to Union Grove, on the easterly side of the river, and then crosses the river. The bend begins between stations 652 and 664, and on larger map between stations 667 and 676. On the smaller map between stations 408 and 468 is in the town of Middletown. The corresponding portion of the road on the large map are between stations 412 and 470, and that portion is in the town of Andes. There is no certificate upon the small map.

It is about eight miles from Lumberville to Shavertown. Both of these maps the line runs between Lumberville and Shavertown. On one of the maps on one side of the river and on the other map the other side. I know where the work on the line has been done. It does not run within a mile of Shavertown.

95 (Signed) GEORGE T. WARNER.

Subscribed and sworn to before me, at Delhi, in the northern district of New York, the 11th day of June, A. D. 1884.

JONAS M. PRESTON,
Notary Public in and for Delaware County,
State of New York.

The large map referred to in the testimony of this witness is the same one which was introduced in evidence by the plaintiff (the defendant in error), as appears at folio 15 of this bill of exceptions. The smaller map, filed May 1st, 1872, was introduced in evidence by the defendant (the plaintiff in error), who will produce the same or a copy thereof for the purposes of the argument.

96 Mr. JOHNSON: Now, we shall ask the plaintiff's attorney to concede, as appears from the map and record, that the distance is 31 miles from one end to the other of this branch railroad—about 31 miles.

Mr. GLEASON: I concede that.

It is conceded that the stock put in evidence was cut off by a judgment and sale under a foreclosure of a mortgage executed by the railroad company in 1872; that the judgment of foreclosure was entered September 18th, 1881, and sale had December 10th, 1881, and the proceeds of the sale were insufficient to pay the referee and nothing was realized for the stockholders, and the title of the town of Andes to the stock was extinguished and no one has redeemed on behalf of the stockholders.

Mr. JOHNSON: We will ask you to concede, as a matter of fact, Mr. Gleason, that the amount of taxable property represented by the conditional papers constituting a part of the petition was $65,960, and the number of tax-payers appearing upon the said conditional papers was 48, and the remaining represented less than a majority of taxable property by $60,000, and the number of tax-payers, including the conditional paper, would be 38 less than a majority, and, further, that no one of the papers was verified except No. 7.

Mr. GLEASON: I think they better make an offer to prove that.

The COURT: You are willing to concede the fact?

Mr. GLEASON: Assuming these facts are competent.

The COURT: I will rule for the present purposes that they are.

Mr. GLEASON: I will conceed- the facts and take an exception.

97 The plaintiff's counsel further conceded that the signature of Edwin D. Wagner appearing upon the certificate of incorporation of the Delhi and Middletown Railroad Company, put in evidence by the plaintiff and filed in the office of the secretary of state November 14th, 1870, including the sum purporting to have been subscribed, is the genuine signature and handwriting of the gentleman who was county judge of Delaware county at the time of the bonding proceedings and who made the adjudication put in evidence.

Mr. JOHNSON: Now, I offer to prove by John Blakie that he was one of the original subscribers to the stock, and that he never paid anything on his subscription whatever.

Objected to as immaterial.

The COURT: I will sustain the objection.

Defendant's counsel duly excepted.

Mr. JOHNSON: Also, by John Whitney, that he was one of the subscribers and had not paid anything to the time of the filing of the articles of association, and that he did not pay ten per cent. or any sum upon his subscription.

Objected to.

Same ruling and exception.

Testimony closed.

The court *aws* thereupon requested on behalf of the defendant to nonsuit the plaintiff on the following grounds:

First.

The persons or parties from whom the plaintiff purchased the coupons in question could not have maintained this action if no such transfer had been made; consequently, under the Federal judiciary act of 1887, this court has no jurisdiction to entertain this action.

98

Second.

It does not appear that the alleged railroad company in whose aid the bonds purport to have been issued was ever duly incorporated, as required by the laws of the State of New York. On the contrary, it does affirmatively appear by the articles of association that the company was organized solely for the purpose of "constructing" a railroad.

Third.

The petition was insufficient to confer jurisdiction on the county judge because it did not allege that the railroad company was a domestic corporation.

Fourth.

It appears affirmatively that the ten per cent. in cash was not paid, as required — the statutes of the State of New York.

Fifth.

The plaintiff was not a "*bona fide*" holder of the coupons in suit.

Sixth.

The alleged judgment declaring the town bonded is void because no place is designated in the notice published by the county judge where he would proceed to take proof and otherwise act on the petition.

Seventh.

It appears that the bonds were made payable in less than thirty years from the time when they were actually issued.

Eight.

The amount subscribed to the original stock was conditional, as appears by the articles of association.

Ninth.

There was not a sufficient amount subscribed to the original stock, as required by the statutes of the State of New
99 York, viz., $1,000 per mile.

Tenth.

The petition consenting to bond the town was conditional, as appears by four of the papers constiting the same, viz., Nos. 1, 4, 5, and 14, and the remaining papers constitute less than a majority of the taxable property or of the taxable inhabitants of the defendant, the said Town of Andes.

Eleventh.

Edwin D. Wagner, the county judge before whom the adjudication was had, under which the plaintiff claims, was at the time thereof a stockholder in the alleged railroad company, having been one of the original subscribers to the extent of $100, and the pretended adjudication is therefore absolutely void for want of jurisdiction.

Twelfth.

It appears that after the alleged petition was filed and after the alleged adjudication was made the said railroad company changed the line of its route so that it became and was materially different from the line as it existed when the petition was filed, and for this reason the bonds (especially those which were issued subsequent to the change) were absolutely null and void.

The court denied the motion for a nonsuit; to which ruling the defendant's attorney duly excepted.

The court was thereupon requested in behalf of defendant to hold as a matter of law that no recovery could be had on coupons in suit which had matured more than six years before the commencement of this action.

The court declined to so hold; to which ruling defendant's attorney duly excepted.

100 The court then directed the jury to render a verdict in favor of the plaintiff and against the defendant for the sum of $32,352.63.

To which ruling and direction defendant's counsel duly excepted.

The jury did thereupon render a verdict in favor of the plaintiff and against the defendant for the sum of $32,352.63. A stay of proceedings was then granted to enable defendant's attorney to prepare a bill of exceptions and procure a writ of error. The foregoing contains all the material testimony and proceedings had in the trial of this action.

W. H. JOHNSON,
Defendant's Attorney in Original Suit.

Office and P. O. address, Ford block, Oneonta, N. Y.

Stipulated that the foregoing bill of exceptions is correct and that the same may be certified and filed in the clerk's office.

JOHN B. GLEASON,
Att'y for Plaintiff in Original Suit.
W. H. JOHNSON,
Att'y for Defendant in Original Suit.

And because none of the aforesaid rulings, decisions, and exceptions appear in the record in said case the judge presiding at said trial hath hereunto set his hand and seal the 25 day of April, 1891.

WM. J. WALLACE,
U. S. Circuit Judge. [L. s.]

(Indorsed:) Bill of exception. Filed Apr. 25, 1891. W. S. Doolittle, clerk.

101 *Bond on Writ of Error.*

Know all men by these presents that we, James F. Scott, William Oliver, John Dickson, Asael Bryant, John A. Gladstone, Alexander Liddle, James Fletcher, Thomas Liddle, Reed Dummond, William S. Doig, Robert Gladstone, Isaac Samuels, Robert R. Gladstone, Thomas Gladstone, John Jackson, Ephraim A. Worden, David Craig, George Liddle, Dixon E. Coulter, Archibald Shaw, Andrew R. Worden, Walter Armstrong, Crawford Shaw, William A. Hull, John Campbell, Edward N. Norton, David Muir, Lewis B. Hamilton, Thomas Edwards, William Scott, James N. King, all of the town of Andes, in the county of Delaware and State of New York, are held and firmly bound unto Dudley P. Ely in the full and just sum of sixty-six thousand dollars ($66,000.00) to be paid to the said Dudley P. Ely, his certain attorneys, executors, and administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of May, 1891.

Whereas lately, at a session of the U. S. circuit court for the northern district of New York, in a suit depending in said court between Dudley P. Ely, plaintiff, and The Town of Andes, defendant, a final judgment was rendered against the said defendant, The Town of Andes, December 31st, 1890, in the sum of thirty-two thousand six hundred and seventy-six dollars and seventy-one cents, and the said

102 defendant, The Town of Andes, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Dudley P. Ely, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., the twenty-fifth day of May, 1891:

Now, the condition of this bond is such that if the said town of Andes shall prosecute said writ of error to effect and answer all damages and costs if the town of Andes fail to make its plea good,

then the above obligation to be void; else to remain in full force and virtue.

JAS. F. SCOTT.	[L. S.]
WILLIAM OLIVER.	[L. S.]
JOHN DICKSON.	[L. S.]
A. BRYANT.	[L. S.]
JNO. A. GLADSTONE.	[L. S.]
ALEXANDER LIDDLE.	[L. S.]
JAMES FLETCHER.	[L. S.]
THOMAS LIDDLE.	[L. S.]
REED DUMOND.	[L. S.]
WM. S. DOIG.	[L. S.]
ROBERT GLADSTONE.	[L. S.]
ISAAC SAMUELS.	[L. S.]
ROBERT R. GLADSTONE.	[L. S.]
THOMAS GLADSTONE.	[L. S.]
JOHN JACKSON.	[L. S.]
E. A. WORDEN.	[L. S.]
DAVID CRAIG.	[L. S.]
GEO. LIDDLE.	[L. S.]
DIXON E. COULTER.	[L. S.]
ARCHIBALD SHAW.	[L. S.]
ANDREW R. WORDEN.	[L. S.]
WALTER ARMSTRONG.	[L. S.]
CRAWFORD SHAW.	[L. S.]
WM. A. HULL.	[L. S.]
JOHN CAMPBELL.	[L. S.]
EDWARD M. NORTON.	[L. S.]
DAVID MUIR.	[L. S.]
LEWIS B. HAMILTON.	[L. S.]
THOMAS EDWARDS.	[L. S.]
WM. SCOTT.	[L. S.]
JAMES N. KING.	[L. S.]

103 STATE OF NEW YORK, } *ss:*
County of Delaware, }

On this 14th day of May, 1891, before me the subscribers appeared, viz., James F. Scott, William Oliver, John Dickson, Asael Bryant, John A. Gladstone, Alexander Liddle, James Fletcher, Thomas Liddle, Reed Dumond, William S. Doig, Robert Gladstone, Isaac Samuels, Robert R. Gladstone, Thomas Gladstone, John Jackson, Ephraim A. Worden, David Craig, George Liddle, Dixon E. Coulter, Archibald Shaw, Andrew R. Worden, Walter Armstrong, Crawford Shaw, William A. Hull, John Campbell, Edward M. Norton, David Muir, Lewis B. Hamilton, Thomas Edwards, William Scott, and James N. King, to be severally personally known to be the same persons described in and who executed the foregoing undertaking, and severally acknowledged that they executed the same.

[L. S.] C. M. SHAW,
Notary Public.

STATE OF NEW YORK, } ss:
County of Delaware, }

James F. Scott, William Oliver, John Dickson, Asael Bryant, John A. Gladstone, Alexander Liddle, James Fletcher, Thomas Liddle, Reed Dumond, William S. Doig, Robert Gladstone, Isaac Samuels, Robert R. Gladstone, Thomas Gladstone, John Jackson, Ephraim A. Worden, David Craig, George Liddle, Dixon E. Coulter,
104 Archibald Shaw, Andrew R. Worden, Walter Armstrong, Crawford Shaw, William A. Hull, John Campbell, Edward M. Norton, David Muir, Lewis B. Hamilton, Thomas Edwards, William Scott, James N. King, being severally duly sworn, each for himself says: The said Jas. F. Scott that he is a resident and freeholder of the county of Delaware, State of New York, and that he is worth the sum of $4,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under execution; and the said William Oliver for himself says that he is a resident of Delaware county, N. Y., and is worth the sum of $4,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said John Dickson for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $3,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said Asael Bryant for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $4,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said John A. Gladstone for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and
105 the said Alexander Liddle for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said James Fletcher for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said Thomas Liddle for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said Reed Dumond for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said William S. Doig for himself says that he is a resident of Delaware county, N. Y., and

worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said Robert Gladstone for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution;

106 and the said Isaac Samuels for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from — and sale under an execution; and the said Robert R. Gladstone for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said Thomas Gladstone for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said John Jackson for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said Ephraim A. Worden for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said David Craig for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution;

107 and the said George Liddle for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said Dixon E. Coulter for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said Archibald Shaw for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and — all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under execution; and the said Andrew R. Worden for himself says that he — a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said Walter Armstrong for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes

or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said Crawford Shaw for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said William Hull for himself says that he is a resident of Delaware county, N. Y., and worth the sum
108 of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said John Campbell for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution; and the said Edward M. Norton for himself says that he is a resident and freeholder of the county of Delaware, New York State, and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt from execution by law on sale under execution; and the said David Muir for himself says that he is a resident and freeholder of the county of Delaware, State of New York, and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy & sale on execution; and the said Lewis B. Hamilton for himself says that he is a resident of the county of Delaware, New York State, and worth the sum of $2,000 over and above all debts & liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale on execution; and the said Thomas Edwards for himself says that he is a resident of the county of Delaware and State of New York and worth the sum of $2,000 over and above all debts & liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale on execution; and the said William Scott for himself says that
109 he is a resident of the county of Delaware and State of New York and worth the sum of $2,000.00 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale on execution; and the said James N. King for himself says that he is a resident of Delaware county, N. Y., and worth the sum of $2,000 over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under execution.

JAS. F. SCOTT.	GEORGE LIDDLE.
ROBERT R. GLADSTONE.	CRAWFORD SHAW.
LEWIS B. HAMILTON.	JAMES N. KING.
JAMES FLETCHER.	WM. A. HULL.
A. BRYANT.	DAVID MUIR.
JNO. A. GLADSTONE.	THOMAS LIDDLE.
ANDREW R. WORDEN.	THOMAS EDWARDS.
DAVID CRAIG.	WM. SCOTT.
E. A. WORDEN.	JOHN CAMPBELL.
JOHN JACKSON.	WALTER ARMSTRONG.
REED DUMOND.	WILLIAM OLIVER.

ROBERT GLADSTONE. EDWARD M. NORTON.
WM. S. DOIG. JOHN DICKSON.
THOMAS GLADSTONE. ALEXANDER LIDDLE.
DIXON E. COULTER. ARCHIBALD SHAW.
ISAAC SAMUELS.

Sworn and subscribed before me May 14th, 1891.

C. M. SHAW,
Notary Public.

(Indorsed:) I approve of the within bond both as to form and sufficiency of sureties. Wm. J. Wallace. Filed May 21, 1891. W. S. Doolittle, clerk.

110 *Stipulation.*

United States Circuit Court, Northern District of New York.

DUDLEY P. ELY
against
THE TOWN OF ANDES.

Whereas the original bond upon the writ of error approved and filed April 25th, 1891, refers to the citation as returnable the second Monday of October, 1891, and in fact the citation and writ of error are returnable May 25th, 1891, and the attorney for Dudley P. Ely has objected to the form of the bond, and the attorney for the town of Andes has procured a new bond to be executed in which the citation is correctly described—

Stipulated that the new bond, with the consent of the court, may be approved and filed *nunc pro tunc* in *in* place of the original bond.

May 19, 1891.

JOHN B. GLEASON,
Att'y for Dudley P. Ely.
W. H. JOHNSON,
Att'y for The Town of Andes.

(Indorsed:) Stipulation. Read on application for order. Filed May 21, 1891. W. S. Doolittle, clerk.

111 *Order.*

At a circuit of the United States circuit court for the northern district of New York, held at Utica, commencing on the third Tuesday of March, 1891.

Present: Hon. William J. Wallace, judge.

DUDLEY P. ELY
against
THE TOWN OF ANDES.

Upon reading and filing the stipulation of the attorneys for the respective parties, dated May 19th, 1891, it is—

Ordered that the bond dated May 14th, 1891, is hereby approved, both as to form and sufficiency of sureties, and is ordered to be substituted for the bond filed April 25th, 1891, with like force and effect as if approved and filed upon April 25th, 1891.

WM. J. WALLACE.

(Indorsed:) Order. Filed May 21, 1891. W. S. Doolittle, clerk.

112 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Dudley P. Ely, plaintiff, and The Town of Andes, defendant, a manifest error hath happened, to the great damage of the defendant, The Town of Andes, as by the complainant appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 25th day of May next, in the Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the U. S. Circuit Court, Northern District N. Y.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the 30th April, in the year of our Lord one thousand eight hundred and ninety-one.

W. S. DOOLITTLE, *Clerk.*

Allowed by—
WM. J. WALLACE,
U. S. Circuit Judge.

[Endorsed:] 2937. Writ of error. Original.

113 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To Dudley P. Ely, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on

the 25th day of May next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein The Town of Andes is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, this 30 day of April, in the year of our Lord one thousand eight hundred and ninety-one.

WM. J. WALLACE,
U. S. Circuit Judge.

Due & personal service of the foregoing citation and of the writ of error, granted April 30, 1891, in behalf of The Town of Andes against Dudley P. Ely is hereby admitted at South Norwalk, Connecticut, this 4th day of May, 1891.

DUDLEY P. ELY.

I certify that the foregoing is the genuine signature of Dudley P. Ely, def't in error, and I do appear for him in all matters connected with said writ of error.

New York, May 5, 1891.

JOHN B. GLEASON,
Att'y of Record for Dudley P. Ely.

The clerk U. S. Supreme Court at Washington is requested to enter the appearance of John B. Gleason as counsel for the defendant in error.

New York, May, 1891.

JOHN B. GLEASON,
Counselor U. S. Supreme Court.

[Endorsed:] Citation. U. S. circuit court, N. D. of N. Y. Filed May 6, 1891. W. S. Doolittle, clerk. Original return.

114 UNITED STATES OF AMERICA, *Northern District of New York,* } *ss:*

I, William S. Doolittle, clerk of the circuit court of the United States of America for the northern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 113, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Dudley P. Ely against The Town of Andes as the same remain of record and on file in said office.

Seal of the U. S. Circuit Court, Northern District N. Y.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Utica, in the northern district of New York, in the second circuit, this twenty-first day of May, in the year of our

Lord one thousand eight hundred and ninety-one, and of the Independence of the said United States the one hundred and fifteenth.

W. S. DOOLITTLE, *Clerk.*

Endorsed on cover: Case No. 14850. N. New York C. C. U. S. No. 1376. The Town of Andes, plaintiff in error, *vs.* Dudley P. Ely. Filed September 21, 1891.

158-312

Office Supreme Court U. S.
FILED.
APR 13 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

TERM NO. 295.

—o—

THE TOWN OF ANDES, PLAINTIFF IN ERROR,

vs.

DUDLEY P. ELY.

—o—

PAPERS ON MOTION.

Supreme Court of the United States.

TERM NO. 295.

—o—

THE TOWN OF ANDES, PLAINTIFF IN ERROR,

vs.

DUDLEY P. ELY.

—o—

PAPERS ON MOTION.

—o—

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STAMFORD, N. Y.:
RECORDER BOOK AND JOB PRINT.
1895.

Supreme Court of the United States. 1

TOWN OF ANDES,
PLAINTIFF IN ERROR,
agt.
DUDLEY P. ELY.

SIR:—Please take notice that a motion will be made to this Court, at the Capitol in the city of Washington, D. C. on the 15th day of April, 1895, at the opening of the Court upon that day or as soon thereafter as counsel can be heard, for a rule or order of this Court, that further proceedings upon the writ of error herein, now pending in this Court, and the hearing and argument thereupon be stayed until the final determination of the action brought by the Plaintiff in Error herein, in the Supreme Court of the State of New York and mentioned and described in the affidavit of James F Scott hereto annexed and served herewith, or that the said proceedings and argument and hearing upon said writ of error herein be continued until such determination of said action, or until the next term of this Court, as to the Court it may seem just and proper to grant in the premises, and that the grounds of said motion, are 2
that the defendant in error herein is not the owner of the judgment or coupons sued on in this action; that by fraud the plaintiff in error was induced to withdraw the defense of non-ownership on the trial of this action and that there is now pending before the Court of Appeals of the State of New York an action to restrain the enforcement or collection of the judgment in this action and further proceedings thereupon, as will more fully appear from the affidavit and papers annexed thereto upon which this motion is made, and

reference to which is hereby made for a more complete statement of the grounds of this motion.

Dated, April 4, 1895.

Yours, &c.,

THE TOWN OF ANDES,
Plaintiff in Error.

C. L. ANDRUS, Counsel, Stamford, N. Y.

STATE OF NEW YORK, } ss.:
DELAWARE COUNTY, }

James F. Scott being duly sworn deposes and says that he is the duly elected and acting Supervisor of the
3 Town of Andes, the Plaintiff in Error in the above entitled action, which said town is one of the towns of Delaware County in the State of New York.

That this action was brought by Dudley P. Ely the above named Defendant in Error, a resident of the State of Conn., on or about the 31st day of December, 1889, to recover upon coupons for interest alleged to be due and unpaid upon certain alleged bonds or obligations of the said town of Andes, issued in aid of the Delhi and Middletown Railroad Company, and that such proceedings were thereafter had herein that judgment was rendered by said Circuit Court in favor of the said Ely and against the said Town of Andes for the sum of $32,676.71 damages and costs, which judgment was docketed in the office of the Circuit Court of the United States, in and for the Northern District of New York, in which Court said action was brought, on or about December 31st, 1890 and thereafter upon application of the Plaintiff in Error, defendant in said action, a Writ of Error was allowed and the said action is now pending upon said Writ of Error in this Court, and has not yet been heard or determined, but is on
4 the present calendar of the Court for argument, and as deponent is informed and believes true is likely to be reached for argument, during the present month.

That as deponent is informed and believes true the said Dudley P. Ely at the time of the commencement

of this action was not, nor has he ever been, the owner of said coupons upon which this action was brought and said judgment recovered, but said coupons were at the time of the commencement of this action and ever since have been the property of the following named persons and corporations to wit: George H. Millard, the Town of Delhi, Sarah M. Phyfe, John W. Blair, William McCune, James B. Lee individually and as executor of the will of Mary Douglass deceased, James M. Hastings, Alice Newkirk, Jennie E. Thompson individually and as administratrix of D. Lyle Thompson deceased, The Hudson City Savings Institution, Horace G. Young as executor etc. of Thomas Cornell deceased, The Rondout Savings Bank, Kate M. Campbell, Harriet J. VanDusen and Janette Benson as administratrix etc. of Anthony Benson deceased, and that the judgment herein in fact belongs to the said persons and corporations and they are the owners thereof, and the said Dudley P. Ely was and is but a nominal plaintiff herein, having no interest in this action or in said judgment, but whose name has been used solely for the purpose of giving the Court apparent jurisdiction of this cause as will more fully hereinafter appear. That all of said persons were at the time of the commencement of this action and ever since have been residents of the State of New York, and the said corporations were and are all corporations duly organized, incorporated and engaged in business in said State of New York.

That as deponent is informed and believes true the said coupons upon which this action was brought as aforesaid were at the time of the commencement of this action and ever since have been in the possession of John B. Gleason, Esq., attorney and counsel for said Dudley P. Ely herein, for collection and so received from the respective owners thereof and so held by him. That annexed hereto and marked "Ex. A" and "Ex. B" are true copies of the correspondence of said Gleason

and the receipt given by him for the coupons included
6 in this action so as aforesaid owned by Alice Newkirk one of the persons aforesaid, setting forth the manner in which the said Gleason received and holds the same for collection, and as deponent is informed and believes true the other coupons herein sued upon were received by said Gleason and are held by him under substantially the same arrangement,

And deponent further says that as he is informed and believes true all of the aforesaid facts as to the ownership and possession of the said coupons have been discovered by the said Plaintiff in Error herein its officers and agents since the rendition of the judgment aforesaid herein and since the allowance of said Writ of Error.

That no question as to the title of said Dudley P. Ely to said coupons was made upon the trial of this action in the Circuit Court aforesaid, and the defense of non-ownership of said coupons was withdrawn from the action and not litigated for the reasons given and the facts set forth and alleged in the complaint in an action brought by the Plaintiff in Error herein against the above mentioned persons and corporations alleged
7 to be the actual owners of said coupons hereinafter referred to, a copy of which said complaint is hereto annexed and marked "Ex. C." and is hereby made a part of this affidavit. That in consequence of the fraud alleged in the said complaint "Ex. C." and of the false and fraudulent statements made as to the ownership of said coupons therein set forth and relying upon the same the said Town of Andes prior to the trial of this action in said Circuit Court signed a stipulation withdrawing said issue from the trial aforesaid a copy of which is hereto annexed and marked "Ex. D."

And deponent further shows that upon the discovery by said Plaintiff in Error herein its officers and agents of the facts as to the ownership and possession of said coupons and the ownership of the cause of action

herein and the judgment thereupon and of the fraud set forth in the said complaint hereto annexed, and on or about the 25th day of August, 1893, an action in equity was commenced in behalf of the said Town of Andes in the Supreme Court of the State of New York by the duly authorized officers and agents of said Town of Andes, to enjoin and restrain the owners of said coupons, the persons and corporations aforesaid and 8
the said John B. Gleason who is also a resident of the State of New York from further prosecuting this action or taking any further steps to enforce or collect the judgment recovered herein, and for judgment enjoining and restraining them as aforesaid, on the ground that the said judgment was and is void for want of jurisdiction in the aforesaid Circuit Court because of the non-ownership by the said Ely of the said coupons and for fraud, upon the said Town and upon the said Court as will more fully appear from the complaint in said action, which is the complaint hereinbefore referred to and hereto annexed and marked "Ex. C." as aforesaid; that the said Dudley P. Ely was also a party defendant and duly served with the process and pleadings therein in the manner provided by the Laws of the State of New York, and all of the other defendants therein were duly and personally served with said process and the defendants, the Town of Delhi, George H. Millard, Sarah M. Phyfe, Mary Phyfe, William McCune, James B. Lee individually and as executor of Mary Douglas, James M. Hastings, Hudson City Savings Institution, Horace G. Young as executor etc. of 9
Thomas Cornell, Janette Benson as administratrix of Anthony Benson, John B Gleason, Kate M. Campbell, Jennie M. Thompson, and John W. Blair therein duly appeared and answered in said action, and the same was duly brought on for trial and tried in said Supreme Court of the State of New York in May, 1894, and judgment directed by the Court therein dismissing the complaint, at the opening of the trial upon the facts

therein alleged. That an appeal was thereupon taken to the General Term of the Supreme Court by the said Town of Andes and after argument therein said judgment of the Supreme Court was affirmed. That the said Town of Andes thereupon duly appealed from the judgment of the said General Term to the Court of Appeals of the State of New York and said appeal is now pending and undisposed of in the said Court of Appeals and will be brought on for argument as soon as reached in said Court, and as deponent is advised by his counsel therein, there are good and legal grounds for believing that the said judgment will be reversed and a new trial upon the merits granted by said Court
10 of Appeals therein.

That as deponent is advised by counsel and verily believes it is within the power and jurisdiction of the Supreme Court of the State of New York to enjoin the aforesaid owners of the coupons herein sued upon and the said judgment herein rendered, residents of the said State from further proceedings tending to the collection of the said judgment or proceeding herein, and the said Plaintiff in Error herein desires that the hearing and argument upon the aforesaid Writ of Error now as aforesaid pending in this Court in this action be stayed until the determination by the Court of Appeals of the State of New York of the action therein pending as aforesaid and if a new trial is awarded by said Court of Appeals until the determination of said action, or that the said hearing and argument herein be continued until the determination of said action or until the next term of this court as may seem proper and expedient to this Court.

That as deponent verily believes the interests of the said Plaintiff in Error demand such stay or continuance.

11 JAMES F. SCOTT, Supervisor.

Sworn to before me this }
3rd day of April, 1895. }

JAMES BALLANTINE, Notary Public.

"Ex. A."

JOHN B. GLEASON,
Counselor at Law,
Room 130. 115 Broadway, New York.

MRS. PHOEBE ANN NEWKIRK, Andes, New York.—I am about to put in judgment in the United States Court the coupons upon the Town of Andes bonds held by my clients. As executrix of Mr. John R. Newkirk you hold, I believe, $1,100, of bonds. I advise you to send to me at once the over due coupons from March, 1892, down to and including September, 1889. I represent, as you know, all of the bond holders who were sued in the State Court; and make this suggestion in your interest, as you do not have coupons enough to have them sued by themselves in the United States Court; even if you had a person to whom you could transfer them; all this I will attend to for you and my charges will be made satisfactory to you. I expect, also that when the litigation in the State Court is over 12
so that the amount of the bill of Wm. & J. B. Gleason in the action in which you are now a defendant can be ascertained, you will be given an option to pay the same in coupons at a fair valuation, if you shall desire. The charges in that action will be adjusted upon a reasonable and pro rata basis satisfactory to you.

Yours truly,

J. B. GLEASON.

"Ex. B."

JOHN B. GLEASON,
Counselor at Law,
115 Broadway, New York.

MISS ALICE NEWKIRK, Andes, New York.,

DEAR MADAM:—I have received you favor of the 9th, enclosing coupons from March 1st, 1892, to September 1st, 1889, inclusive cut from $1,100, of bonds of the Town of Andes namely: Bonds Nos. 174, 192, 210, 222,

223, of $100 each, and No. 29 of $500, said coupons being 96, coupons of $3.50 each, and 16 coupons of $17.50 each, and of the face amount of $616; and for the proceeds of these coupons, I agree to account to
13 you so soon as any moneys arising thereon shall be received by me.

Yours truly,

J. B. GLEASON.

December 11, 1889.

SUPREME COURT—DELAWARE COUNTY.

THE TOWN OF ANDES,
PLAINTIFF,
agst.
JOHN B. GLEASON, DUDLEY P. ELY, THE TOWN OF DELHI, GEO. H. MILLARD, SARAH M. PHYFE, JOHN W. BLAIR, WILLIAM McCUNE, JAMES B. LEE, individually and as executor of the will of Mary Douglass, deceased; JAMES M. HASTINGS, ALICE NEWKIRK, JENNIE M. THOMPSON, individually and as administratrix of the estate of D. Lyle Thompson, deceased; THE HUDSON CITY SAVINGS INSTITU-
14 TION, HORACE G. YOUNG, as executor of and trustee under the will of Thomas Cornell, deceased; THE RONDOUT SAVINGS BANK, KATE M. CAMPBELL, HARRIET J. VAN DUSEN, JANETTE BENSON, as administratrix of the estate of Anthony Benson, deceased.
DEFENDANTS.

The above named plaintiff for an amended complaint against the defendants, respectfully shows to the Court:

FIRST.

That the Town of Andes, (the plaintiff) now is, and for more than thirty years last past has been, one of the Towns of the County of Delaware in the State of New York, duly organized and existing under the Statutes of the State.

SECOND.

Upon information and belief, that, on or about the 31st day of December, 1889, an action in the United States Circuit Court for the Northern District of New York, wherein the defendant, Dudley P. Ely, was named as plaintiff, and this plaintiff, the Town of 15
Andes, was defendant, was commenced by the service therein of process tested the 27th day of December, 1889, and that such proceedings were thereafter had in said action, that the said defendant, Dudley P. Ely, as appears by the record, recovered a judgment in said Circuit Court against the plaintiff, for the sum of $32,676.71 damages and costs, which judgment was entered and docketed in the office of the Clerk of the said Circuit Court at Utica, in said State of New York, on the 31st day of December, 1890, and said judgment still remains unsatisfied and undischarged of record and has not been vacated or reversed, and is claimed by these defendants to be a valid lien and charge upon plaintiff and the taxable property and inhabitants therein, and that the defendant John B. Gleason, appeared as the plaintiff's attorney in said action and judgment.

THIRD.

That the said action as appears by the complaint therein, (a copy of which is hereto annexed marked "A.") was brought in the name of the defendant, Dudley P. Ely, by the said defendant, John B. Gleason, 16
appearing as his attorney to recover the amount apparently due on certain paper writings consisting of bonds and coupons therein described, which were alleged and claimed to be obligations of this plaintiff,

the said Town of Andes, but as this plaintiff is informed and believes, the said obligations were null and void, for various reasons, amongst which were the following: The alleged railroad company in whose aid the bonds purported to have been issued, was never duly incorporated as required by the laws of the State of New York, but was organized solely for the purpose of constructing a railroad. The petition upon which proceedings were commenced, was insufficient to confer jurisdiction upon the County Judge because it did not allege that the railroad was a domestic corporation.

The ten per cent. as required by the Statutes of the State of New York, was not paid upon the original stock subscription. The amount subscribed to the original stock for the purpose of organizing the alleged railroad company was conditional as appears by the articles of association on file in the office of the Secre-
17 tary of State.

There was not a sufficient amount subscribed to the original stock of said railroad company, as required by the Statutes of the State of New York, viz: $1,000 per mile.

The alleged judgment of the County Judge of Delaware County, declaring the Town bonded, was, and is, void because no place was designated in the notice published by said County Judge, when he would proceed to take proof and otherwise act on the petition.

The petition consenting to bond the Town, was conditional as appears by four of the papers constituting the same, viz: Nos. 1, 4, 5, and 14, and the remaining papers constitute less than a majority of the tax-payers and the taxable property of this plaintiff, the said Town of Andes, upon its last preceeding assessment roll, and including all together, the said petition and papers was not signed by a majority of the tax-payers representing a majority of the taxable property upon the last preceeding assessment roll of this plaintiff. And Edwin D. Wagner, the then County Judge of

Delaware County, before whom the adjudication was had, and in pursuance of which it was claimed that 18
this plaintiff was bonded, was at the time of such alleged adjudication, a stockholder in the alleged railroad company, having been one of the original subscribers to such stock to the extent of $100, and the pretended adjudication was absolutely void for want of jurisdiction. And the bonds, obligations and coupons set forth in said action in the Federal Court, and upon which said judgment was obtained therein, had been held and adjudicated to be null and void by the Court of Appeals of this State, in the case of Craig vs. the Town of Andes, reported in the 93d, of New York Reports at page 405.

FOURTH.

Upon information and belief that all of the foregoing facts were well known to the defendant, John B. Gleason, who was and is an attorney and counselor of this Court, and also of the said United States Circuit Court, and with full knowledge of such facts as aforesaid, he, the said Gleason, on or about the 11th day of November, 1889, with intent to cheat and defraud the said Town falsely and fraudulently, stated and represented to James Taylor, Esq., who was then its acting 19
Supervisor, or his attorney or one or both of them, that he, said Gleason, had made arrangements to have an actual sale and transfer made and would have the same done, of certain coupons purporting to be the obligations of said town, to some person who was a non-resident of the State of New York, so that the Federal Courts would have jurisdiction to entertain an action thereon, and so that a judgment if so obtained could be reviewed in the United States Supreme Court, and that the said supervisor believing such statements and relying upon them, was induced to sign and did sign the stipulation hereto annexed marked "B" and thereupon and thereafter the said action was commenced by said defendant, Ely, and a complaint served

with the summons, which was verified by the defendant, John B. Gleason, December 30th, 1889, and that thereafter and on or about the 18th day of March, 1890, the attorney for this plaintiff, (defendant in that action) was fraudulently procured to stipulate to consent to an amendment to the complaint in that action by which the sum of $1,120 more in face value of said coupons were included in the complaint, and the
20 schedule of the bonds and coupons corrected by inserting them therein and the demand for judgment changed so as to make it that much more than in the original complaints by stating and representing that he knew of a party who would buy or had bought them and would put them with some others and bring another suit for a little over $2,000, and that unless he was permitted to so put them in and accordingly amend, he would bring another action against this said Town, which plaintiff alleges was not true, which bonds and coupons are described in said stipulation as follows:

$500 BONDS.

No. 20.	16 coupons, Nos. 21-36 inc.,	each $17.50,	$280.
53.	" " " " " " "		280.
54.	" " " " " " "		280.

$100 BONDS.

No. 165.	16 coupons, Nos. 21-36 inc.,	each $3.50,	$56.
168.	" " " " " " "		56.
186.	" " " " " " "		56.
251.	" " " " " " "		56.
260.	" " " " " " "		56.

FIFTH.

21 Upon information and belief that the aforesaid coupons described in said complaint, (and including the ones referred to in the said stipulation and inserted in the complaint by said agreement to amend) in said action in the Federal Court and upon which the aforesaid judgment was obtained therein, were never actually transferred to said defendant, Dudley P. Ely, and he never became the owner thereof by any transfer,

(except as to a small amount cut from two thousand dollars of bonds belonging to the defendant herein, George H. Millard, who was and is a son-in-law of said Ely, and which transfer was and is collusive as between said Millard and Ely, and same was transferred, if at all, to get said coupon out of the State of New York and attempt to deprive the Courts of the State of New York of its lawful jurisdiction, and to attempt to confer jurisdiction upon the Federal Courts, and same was fraudulent) and the actual ownership of each and all of said bonds and coupons was at the time of the commencement of said action and ever since has been in parties then and ever since residing in the State of New York, (except as to the Millard coupons collusively transferred) and the said defendant, Ely, 22
was a fictitious plaintiff having at the time of the commencement of said action by him in said United States Circuit Court, no interest in said bonds or coupons or ownership thereof or any of them and with reference to which said action and said Ely, plaintiff therein, the said Federal Court, viz: The United States Circuit Court for the Northern District of New York had no jurisdiction whatever.

SIXTH.

Upon information and belief that this plaintiff and its attorneys and counsel were induced to refrain and did refrain from asserting the defense of non-ownership of plaintiff and want of jurisdiction in the United States Circuit Court, and said defenses were not interposed upon the trial thereof and no evidence was given by either party in relation thereto and such issues were not made in, nor litigated or decided by said Court, and that by the aforesaid stipulation entered into by the said Taylor, as the supervisor, and the said defendant, Gleason, herein all issues as to the ownership of the coupons therein sued upon by said Ely, plaintiff as aforesaid in said action in the United States Circuit 23
Court, were withdrawn from the case and no such

issues were presented to the Court in said action upon the trial thereof, or litigated, or tried or decided therein or upon such trial and relying upon the said stipulation and assertions of the said defendant, John B. Gleason, and his sworn statement in writing that the said coupons in question had, before the commencement of the action been transferred to, and at the time of the commencement of the same, the said defendant, Dudley P. Ely, was the actual owner thereof as appears in the said complaint and the verification thereof made by said defendant, Gleason, which statements and assertions and said allegations in the complaint and the affidavit of verification plaintiff alleges upon information and belief were false and fraudulent, and were made for the purpose and with the intent of cheating and deceiving the plaintiff and that neither said plaintiff or its attorneys or counsel, were aware of the facts until long after the entry of the aforesaid judgment, viz: not until on or about the 7th day of March 1893, when such information came to the present acting
24 supervisor of the plaintiff, and as plaintiff is advised and believes prior to such discovery and receipt of such information, the time had expired within which a motion could be made for relief in the Court in which said action was tried and this plaintiff is advised and verily believes that its remedy at law is under the circumstances inadequate to procure the relief which is sought to be obtained in this action.

SEVENTH.

Upon information and belief that the defendant, the said Town of Delhi, is, and for more than thirty years last past has been one of the towns of the County of Delaware, in the State of New York, duly organized and existing as such under the Statutes of the said State. And that said defendant the Town of Delhi, is as a matter of fact, the owner of about $1,680, face value of the coupons which were described in the complaint in said action in the Federal Court and included

in the judgment hereinbefore described, and was such owner when said action was commenced and when said judgment was obtained.

EIGHTH.

Upon information and belief that the defendant, 25
James B. Lee, is the sole executor and is acting as such of the will of Mary Douglas, late of Bovina, Delaware County, deceased. That the defendant Jennie Thompson, is the administratrix and is acting as such of the estate of her husband, D. Lyle Thompson, late of Bovina, in said County, deceased, and that the defenddant Janette Benson, is the administratrix and is acting as such of the estate of Anthony Benson, late of Kingston, Ulster County, deceased. And that the defendant Horace G. Young, is the executor and trustee of and under the will of Thomas Cornell, late of Kingston, Ulster County, deceased, and is acting as such. The first two above named having been appointed by the surrogate of Delaware County, and the last two by the surrogate of Ulster County. That the defendants the Hudson City Savings Institution and the Rondout Savings Bank, are respectively business corporations duly incorporated organized, and doing business pursuant to the Statutes of the State of New York.

NINTH.

Upon information and belief, that the defendants, 26
George H. Millard, Sarah M. Phyfe, Mary Phyfe, John W. Blair, William McCune, James B. Lee individually and as executor of the will of Mary Douglas deceased, James M. Hastings, Alice Newkirk, Jennie Thompson individually and as administratrix of the estate of D. Lyle Thompson, deceased, the Rondout Savings Bank, Kate M. Campbell, Harriet J. VanDusen, and Janette Benson as administratrix of the estate of Anthony Benson deceased. All and each of them are owners of certain coupons described in the complaint and included in the aforesaid judgment, and were each own-

ers when said action was commenced and judgment was obtained. As to the precise number or amount of such coupons so owned by each of said defendants, the plaintiff is unable to state but alleges upon like information and belief that all of such coupons so included in said judgment belong to other defendants than said Dudley P. Ely, (except the said small sum thereof so collusively transferred by his son-in-law, the defendant, George H. Millard) and with that exception he, said Ely, never had any interest in them and has
27 no interest in the judgment.

TENTH.

Upon information and belief, the plaintiff further alleges, that the said defendants in this action and the agents and officers of the corporations acting therefor, each and all of them well knew and understood when they respectively placed their said coupons at the disposal of the said defendant, John B. Gleason, that they were to be used for the purpose of procuring a fraudulent and unlawful judgment as aforesaid, and that this plaintiff was to be imposed upon as well as the said United States Circuit Court, by the use of a fictitious name as plaintiff in said action, and the plaintiff further alleges and shows to the Court, that if the said defendants shall be permitted to prosecute the said action and judgment to final collection, (no part of the same having been paid or collected) it will greatly distress this plaintiff, its citizens and tax-payers, and will cause it to sustain irreparable damages and loss.

ELEVENTH.

Upon information and belief, the plaintiff alleges that the execution of the stipulation marked "B" by
28 the then acting supervisor of the plaintiff, was wholly unwarranted and unauthorized and was done without the knowledge or consent of the plaintiff, its citizens and taxpayers, and all subsequent proceedings in said action in the Federal Court based upon said alleged stipulation, were unauthorized, null and void, so far as this plaintiff is and was concerned. The effect of such

stipulation and subsequent proceedings having been to deprive this plaintiff of valid legal defenses in said action, viz: To prevent this plaintiff from disputing the residence and citizenship of the plaintiff, in such action and of the ownership of the bonds and coupons upon which the action was brought and the further defense, that if any transfer of coupons had been made to such plaintiff it was collusively done for the purpose of attempting to create a cause of action cognizable by said United States Circuit Court, and thus fraudulently depriving the Courts of this State of rightful and exclusive jurisdiction over the alleged causes of action and thereby and means of such stipulation this plaintiff was wrongfully and fraudulently deprived of valid legal defenses as aforesaid, the same having been fraudulently contrived and prepared by said defendant, 29
John B. Gleason, and procured to be signed for the purpose and with the intent on his part to cheat, defraud and take an unfair advantage of the plaintiff in this action, and to deprive it of legal rights and defenses as aforesaid, which would have otherwise have been available and would have prevented the recovery of any judgment against said plaintiff.

TWELFTH.

Plaintiff further alleges upon information and belief, that the said coupons mentioned and described in the said complaint marked "A." and the amendment to said complaint herein referred to, have never been cancelled but are still in the possession and under the control of the said defendant, John B. Gleason.

WHEREFORE, and for reasons aforesaid, plaintiff prays the judgment and decree of this Court:

FIRST.—That the defendants herein and each and every one of them, be forever enjoined and restrained from collecting and enforcing or attempting to collect or enforce said judgment or any part thereof, or the coupons therein described or any part or portion thereof. 30

SECOND.—Vacating, cancelling and setting aside the aforesaid judgment in the United States Circuit Court and annulling the same for want of jurisdiction and as having been obtained and entered in the name of a fictitious person and who was not the owner of the coupons described in the complaint and judgment and by fraud, and for such other and further judgment and relief as may be equitable and proper and the Court shall see fit to grant besides plaintiff's costs and disbursements of this action.

BARNA JONHSON, Plaintiff's Attorney,
Office and Post Office address:
Andes, Delaware County, New York.

STATE OF NEW YORK, }
DELAWARE COUNTY, } ss.:

James F. Scott, of Andes, in the County of Delaware, being duly sworn, deposes and says: That he is the supervisor of the said Town of Andes, Delaware County, N. Y., the plaintiff in this action. That he has heard the foregoing complaint read and knows the contents thereof, that the same is true of his own
31 knowledge and belief except as to the matters therein stated to be alleged upon information and belief, and as to those matters, he believes it to be true.

JAMES F. SCOTT.

Sworn to and subscribed before me October 19, 1893. }

E. F. STEVENSON, Justice of the Peace.

(EX. B. annexed to foregoing complaint.)

WHEREAS, John B. Gleason, as attorney for persons claiming to be bond-holders of the Town of Andes, intends to bring an action or actions in the United States Circuit Court, and the Town of Andes desires that if such action is brought so as to allow the Town the right of appeal to the United States Supreme

Court in the event of a decision unfavorable to it in the Circuit Court, and the said Gleason has intimated a willingness to consolidate as far as practicable the alleged causes of action against the town so as to allow an appeal to the United States Supreme Court and a decision upon their merits, provided it is not to be claimed by the Town of Andes in so doing a collusive case has been made.

Now, therefore, it is agreed in behalf of the Town of 32
Andes that if the said John B. Gleason, as attorney, within four months from date shall bring an action in the United States Circuit Court for any amount of coupons over $5,000, in the name of a plaintiff alleged to be a resident of another State, the defendant will not deny the citizenship of the plaintiff, nor the sales to him, nor claim that the action should be dismissed as collusively made or brought. Upon the trial the plaintiff will produce the coupons in controversy in the action and will concede that plaintiff's purchases were made after the coupons became due and that the plaintiff before he purchased any coupons knew that the validity of the bonds and coupons was disputed by the Town of Andes, but neither the plaintiff nor any person from whom he purchased shall be examined upon the subject of the sale to the plaintiff or the nature thereof, but the defendant may show by any completed evidence that the plaintiff purchased the coupons after the decision of the Court of Appeals in the case of Craig vs. The Town of Andes, reported in the 93 N. Y. 405, and that he had been informed that such decision had been made at the time of said pur- 33
chase. If, however, an action under this stipulation is brought by Dudley P. Ely of South Norwalk, that plaintiff will not be able to make the aforesaid concession as to certain coupons cut from less than $2,500 of bonds and by said Mr. Ely to have been purchased with the bonds in 1882, but the said concession will be made as to all the other coupons, and as the amount

of the coupons especially referred to with interest is less than $2,000 the plaintiff stipulates that such action shall be dismissed as to said coupons for lack of jurisdiction, provided it is dismissed as to the others for any cause.

If such action is brought a stipulation shall be made therein that any of the evidence and exhibits in case of Town of Andes, plaintiff in error, against Albert Slawson, defendant in error, in the United States Supreme Court may be offered in evidence from the printed case as if the witness was actually sworn in Court and testifying and as said printed exhibits were duly certified, all subject to all legal objections except as aforesaid.

34 Also, if an appeal is had in said action both plaintiff and defendant will unite in a motion to advance the same upon the calendar of the United States Supreme Court.

Dated November 11, 1889.

JAMES TAYLOR,
Supervisor of the Town of Andes.
JOHN B. GLEASON.

"Ex. D."

UNITED STATES CIRCUIT COURT:—NORTHERN DISTRICT OF NEW YORK.

TOWN OF ANDES,
agt.
DUDLEY P. ELY.

STIPULATED, that upon the trial of the action the following facts will be conceded by the respective parties.

I. That the plaintiff is a citizen of the State of Connecticut, residing at South Norwalk, Connecticut.

II. That the plaintiff is the owner and holder of the coupons described in the eleventh allegation of the plaintiff's complaint. It being understood that the plaintiff's attorney will produce said coupons upon the 35
trial of the action.

III. As to all of said coupons except those cut from bonds Nos. 24 and 25 of $1,000 and Nos. 87 and 156 of $100 and amounting to $1,232 of coupons it is conceded that the plaintiff's purchases were made after the coupons became due and that the plaintiff, before he purchased any of said coupons, knew that the validity of the bonds and coupons was disputed by the Town of Andes and that the same were purchased by the plaintiff after the decision of the Court of Appeals of the State of New York in the case of Craig against the Town of Andes, reported in 93 N. Y. at page 405. While this concession does not apply to the said $1,232 of coupons yet it is expressly stipulated that this action shall be dismissed as to these coupons for lack of jurisdiction provided that it is dismissed as to the others for any cause.

IV. Upon the trial, any of the evidence and exhibits in the case of the Town of Andes, Plaintiff in Error, against Albert Slawson, Defendant in Error, in the United States Supreme Court, may be offered in evidence from the printed case with like force as if the 36
witness were actually sworn in Court and testifying, and as if said printed exhibits were duly certified, all subject to all legal objections except as aforesaid.

V. If an appeal or writ of error is had in this action, both parties will unite in a motion to advance the same upon the Calendar of the United States Supreme Court.

VI. Any of the evidence and exhibits in the case of Calhoun and others against the Town of Delhi and others, and in the case of David Craig and others, against the Town of Andes, may also be offered in

evidence from the printed case in the same way as above specified with reference to the Slawson Case.

JOHN B. GLEASON,
Plaintiff's Attorney.

W. H. JOHNSON,
Defendant's Attorney.

II. That the plaintiff is the owner and holder of the coupons described in the eleventh allegation of the plaintiff's complaint. It being understood that the plaintiff's attorney will produce said coupons upon the 35
trial of the action.

III. As to all of said coupons except those cut from bonds Nos. 24 and 25 of $1,000 and Nos. 87 and 156 of $100 and amounting to $1,232 of coupons it is conceded that the plaintiff's purchases were made after the coupons became due and that the plaintiff, before he purchased any of said coupons, knew that the validity of the bonds and coupons was disputed by the Town of Andes and that the same were purchased by the plaintiff after the decision of the Court of Appeals of the State of New York in the case of Craig against the Town of Andes, reported in 93 N. Y. at page 405. While this concession does not apply to the said $1,232 of coupons yet it is expressly stipulated that this action shall be dismissed as to these coupons for lack of jurisdiction provided that it is dismissed as to the others for any cause.

IV. Upon the trial, any of the evidence and exhibits in the case of the Town of Andes, Plaintiff in Error, against Albert Slawson, Defendant in Error, in the United States Supreme Court, may be offered in evidence from the printed case with like force as if the 36
witness were actually sworn in Court and testifying, and as if said printed exhibits were duly certified, all subject to all legal objections except as aforesaid.

V. If an appeal or writ of error is had in this action, both parties will unite in a motion to advance the same upon the Calendar of the United States Supreme Court.

VI. Any of the evidence and exhibits in the case of Calhoun and others against the Town of Delhi and others, and in the case of David Craig and others, against the Town of Andes, may also be offered in

evidence from the printed case in the same way as above specified with reference to the Slawson Case.

JOHN B. GLEASON,
Plaintiff's Attorney.

W. H. JOHNSON,
Defendant's Attorney.

158-312

Office Supreme Court U. S.
FILED.
APR 13 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1894.

—o—

TERM NO. 295.

—o—

THE TOWN OF ANDES,

PLAINTIFF IN ERROR,

vs.

DUDLEY P. ELY.

—o—

BRIEF FOR PLAINTIFF IN ERROR ON MOTION FOR STAY OR CONTINUANCE.

—o—

C. L. ANDRUS,

Counsel,

STAMFORD, N. Y.

STAMFORD, N. Y.:
RECORDER BOOK AND JOB PRINT.
1895.

Supreme Court of the United States.

TOWN OF ANDES,
PLAINTIFF IN ERROR,
agt.
DUDLEY P. ELY.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION.

Motion to stay hearing and argument upon the writ of error herein, or for a continuance thereof.

STATEMENT OF GROUNDS OF MOTION.

That since the entry of judgment herein and allowance of the writ of error therefrom the plaintiff in error has discovered that the plaintiff, defendant in error above named is not the owner of the cause of action upon which this action is brought nor of the judgment thereupon, but that the owners thereof are residents of the State of New York, the same state in which the plaintiff in error is located.

That the question of want of title in the defendant in error was not litigated or determined upon the trial hereof in the Circuit Court, because of fraud practiced upon the plaintiff in error and Trial Court.

That an action is pending and on appeal in the Court of Appeals of the State of New York, brought by the plaintiff in error, against the defendant herein and the persons claimed to be the owners of the cause of action herein to restrain and enjoin said persons from further proceeding herein, or attempting to collect or enforce the judgment obtained in this action.

That a determination of said action in the New York Courts is desired before the hearing and argument upon the writ of error herein, and that the interests of the plaintiff in error will be promoted by the stay sought for on this notice.

POINTS.

First.

Under the facts appearing in the motion papers, the Circuit Court had no jurisdiction of this action and the judgment rendered herein was and is void.

Farmington vs. Pillsbury, 114, U. S. 143.

In that case the coupons in suit were, as held by the Court, collusively transferred to the plaintiff for the purpose of bringing an action in the Federal Courts, and the Supreme Court held that the Circuit Court *never acquired jurisdiction.*

Waite, Ch. J., says: "By the original jurisdiction Act of September 24th, 1789, it was provided that no District or Circuit Court should have cognizance of any suit to recover upon any promissory note or other chose in action, unless a suit might have been prosecuted by the assignor, if no assignment had been made," except as to bills of exchange.

"By the Act of March 3d, 1875, Sec. 11 of the Act of 1789, was changed so as to provide that the Circuit and District Courts should not have cognizance of any suit founded on contract in favor of any assignee, unless a suit might have been prosecuted in such Court to recover thereon, if no assignment had been made, except in cases of promissory notes * * and bills of exchange. * * If any suit commenced in a Circuit Court * * it shall appear to the satisfaction of the Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable under this Act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit."

And further, that even before the amendment of 1875, referred to, "It was equally well settled that if the transfer was fictitious, the assignor continuing to be the real party in interest and the plaintiff on the record but a nominal or colorable party, his name being used for the purpose of jurisdiction, *the suit would be essentially a controversy between the assignor and grantor and the defendant*, notwithstanding the formal assignment or conveyance, and *that the jurisdiction of the Court would be determined by their citizenship, rather than by that of the nominal plaintiff.*"

Under the old practise the objection to the jurisdiction could be only raised by plea in abatement, but the Act of 1875, in the language of Chief Justice Waite, "imposed the duty on the Court, on its own motion, without waiting for the parties to stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered. * * This is a salutary provision which ought not to be neglected. It was intended to promote the ends of justice, *and is equivalent to an express enactment by Congress that the Circuit Court shall not have jurisdiction of suits which do not actually and substantially involve a dispute or controversy* of which they have cognizance, *nor of suits in which the parties have been improperly or collusively made or joined for the purpose of creating a case cognizable under the Act.*" We are clearly of opinion that the case falls within the prohibition of these statutes. * * It is a suit *for the benefit of the owners of the bonds.* * * *The suit is their own in reality*"

The decision in that case and the cases cited by the Court in the opinion clearly determine that the Circuit Court had no jurisdiction of the action brought against the plaintiff herein, and further citation of authorities is unnecessary.

SECOND.

The action in the Supreme Court of New York will lie. The Courts of such State may inquire into the

jurisdiction of the Federal Courts and restrain the enforcement of a judgment entered without jurisdiction.

The Circuit Courts of the United States are Courts of limited jurisdiction, and their claim of jurisdiction and exercise thereof may be examined by the Courts of this State.

Chemung Bank vs. Judson, 8 N. Y. 259; Ruckman vs. Crowell, 1 N. Y. 507; Hayes vs. Burger, 1 Hoffman, Ch. 17.

The want of jurisdiction of any Court, whether of general or limited jurisdiction over either the person or subject matter may be always set up against its judgment when it is sought to be enforced or any benefit claimed under it, and the want of jurisdiction may be shown by extrinsic evidence; and even a recital in the judgment record that the defendant was served with process or appeared by attorney, or of any other jurisdictional fact, may be contradicted by extrinsic evidence. This principle applies to a judgment of a Court of general jurisdiction or of a sister State.

Borden vs. Fitch, 15 Johns, 121; Harbuck vs. Murray, 5 Wend, 148; Shumway vs. Stillman, 6 Wend, 447.

Kerr vs Kerr, 41 N. Y., 272; Hoffman vs. Hoffman, 46 N. Y., 30; Dobson vs. Pierce, 12 N. Y., 164; Barker vs. S. & W. R. R. Co., 10 N. Y., 328; Pendleton vs. Ward, 17 N. Y., 75; Noyes vs. Butler, 6 Barb, 613; Eatham vs. Edgerton, 9 Cow., 227.

Where jurisdiction of the United States Courts of an action depends upon the citizenship of the parties no higher sanctity can be claimed for the judgment of that Court than is due to judgments of State Courts in a like case and under similar circumstances.

21 Wall., 135; 120 U. S., 147.

The decision of the Court, even that it had jurisdiction, would not affect the question, because no tribunal can decide the question of jurisdiction finally and conclusively in its own favor. In the absence of jurisdiction it has no authority to determine anything.

Harrington vs. People, 6 Barb., 607; Noyes vs. Butler, Id, 631; Wilmore vs. Flack, 96 N. Y., 519.

That a Court of equity will restrain a party from enforcing a judgment or taking any benefit from it when it fails for want of jurisdiction has been repeatedly held.

Cornwith vs. Griffin, 21 Barb., 9; Skelton vs. Tiffin, 6 How., 163; Harshey vs. Blackmar, 26 Iowa, 161; Waite & Tudor Cases in Equity; Vol. 2, Part 1, p. 1375 (4th, Am. ed).

The same rule is well settled when the judgment has been obtained by collusion or fraud.

Cornwith vs. Griffith, 21 Barb., 13; Hunt vs. Hunt, 77 N. Y., 227; State of Michigan vs. Phœnix Bank, 33 N. Y; Cases cited, p. 27.

Here it is not only claimed that the Court had no jurisdiction, but also that the town refrained from interposing the defense of want of diverse citizenship in plaintiff because of the fraud of plaintiff.

In the case of Michigan vs. Phœnix Bank supra, where a judgment or award of the Court or Board of Claims of the State of Michigan was relied upon as a defense, the Court found that the award was obtained by fraud upon the board, and the Court of Appeals refused to give such award any force or effect, and cites a large number of cases holding the doctrine that such a judgment may be either set aside, if attacked or disregarded if sought to be used as a defense.

Nor do the provisions of the Constitution and of Acts of Congress that full faith and credit shall be given by each State to the judicial proceedings of an-

other State prevent an inquiry into the jurisdiction of the Court in which the judgment attacked was rendered.

Kerr vs. Kerr, 41 N. Y., 275; Hoffman vs. Hoffman, 46 N. Y., 30; Noyes vs. Butler, 6 Barb., 613; Dobson vs. Pierce, 12 N. Y., 169.

These cases establish the rule that, while the decision of the Court of another State cannot be questioned as to its *correctness*, yet in all cases the judgment of any Court may be attacked for want of jurisdiction or upon an allegation of fraud in its rendition.

While the power of a State Court to *vacate* a judgment of the United States Courts or stay *proceedings of the Court* thereupon may be successfully denied, the right of the Courts of this State to *prevent* the *enforcement* of such a judgment by the *parties thereto*, upon a determination that the judgment was void for want of jurisdiction or fraud has been repeatedly upheld.

This action is not to restrain the enforcement of the judgment by any process which the Court may issue, or to in any way attack the judgment as such, but to *enjoin the owners of the judgment from proceeding thereupon*, from taking any action to enforce the same.

Such an exercise of jurisdiction by a Court of Equity is not a review of the judgment nor an attempt to control the action of the Court rendering the same.

"An injunction to restrain proceedings at law is directed only to the parties, and assumes no superiority over the Court in which the action is pending, but is granted solely on the ground that some equitable circumstances exist which render the prosecution at law against conscience."

Erie R. R. Co. vs. Ramsey, 45 N. Y., 655.

So in Dismore vs. Nerisheimer, 32 Hun, 206, the General Term of the First Department say, "The principle has been regarded and stated as elementary in its character, that a Court of Equity should interfere

when sufficient equitable reasons are presented for doing so to restrain the prosecution of an unconscionable action, although it may be pending in a Court of another State or country. * * This may be done without interfering with the proceedings themselves, *by controlling the conduct of the parties when they are subject to the jurisdiction of the Court* so interposing for the preventing of justice."

In that action an injunction was granted to restrain the prosecution of an action in the Supreme Court of the District of Columbia.

In Dehon vs. Foster, 4 Allen, 550, the Court remarked: "The authority of this Court as a Court of Chancery, upon a proper case being made to restrain persons within this jurisdiction from prosecuting suits either in the courts of this State or of other States or foreign countries is *clear and indisputable.* In the execution of this power Courts of Equity proceed not upon any claim of right to interfere with or control the course of procedure in other tribunals, or to prevent them from adjudicating on the rights of parties when drawn in controversy and duly presented for their determination, but the jurisdiction is founded on the clear authority vested in the Courts of Equity over persons within the limits of their jurisdiction and amenable to process to restrain them from doing acts which will work an injury to others and are therefore contrary to equity and good conscience. As the decree of the Court in such cases is pointed solely at the party and does not extend to the tribunal where the suit or proceeding is pending it is wholly immaterial that the party is prosecuting his suit in the Courts of a foreign State or country.

This case was followed in Vail vs. Knapp, 49 Barb. 308 and in Clafton vs. Hamlin, 62 How., 584; Town of Thomson vs. Morris, 11 Abb., N. C., 171.

The whole question was elaborately discussed by Putman, J. in Stevens vs. Central Nat. Bank, 69 Hun,

p. 463, in which the power of the Supreme Court of the State of New York to enjoin parties to an action from taking proceedings under a judgment of a Federal Court was maintained and an injunction granted. This decision was affirmed by the General Term upon the opinion referred to.

After a review of the authorities the learned Justice says: "With some hesitation I have reached the conclusion under the authority of the cases cited that in some cases this Court as a Court of Equity by its judgment may restrain parties from proceeding in the Federal Courts equity demanding such a judgment. * * * I think that no injunction should be granted by State Courts restraining the enforcement by parties of a Federal judgment where the *effect of such injunction is to raise a conflict with the Federal Court.* Neither probably can proceedings in the Federal Court be enjoined by a State Court. But the authorities above cited seem to hold that in certain exceptional cases parties to an action in a State Court may be enjoined from taking any proceedings under a judgment in a Federal Court."

This language is peculiarly applicable here. No conflict with the Federal Court is attempted; there is no claim of error in any of the proceedings of that Court. It is simply claimed that the judgment of the Court is void for want of jurisdiction, a fact not within the knowledge of the Federal Court and concealed from that Court.

THIRD.

It thus appearing that the Courts of New York have some power in the premises the plaintiff in error should be granted a stay or continuance upon the writ of error herein until the determination of the action in the New York State Courts.

C. L. ANDRUS,
Counsel for Plaintiff in Error,
Stamford, N. Y

United States Supreme Court

No. 968.

THE TOWN OF ANDES,

Plaintiff in Error,

vs.

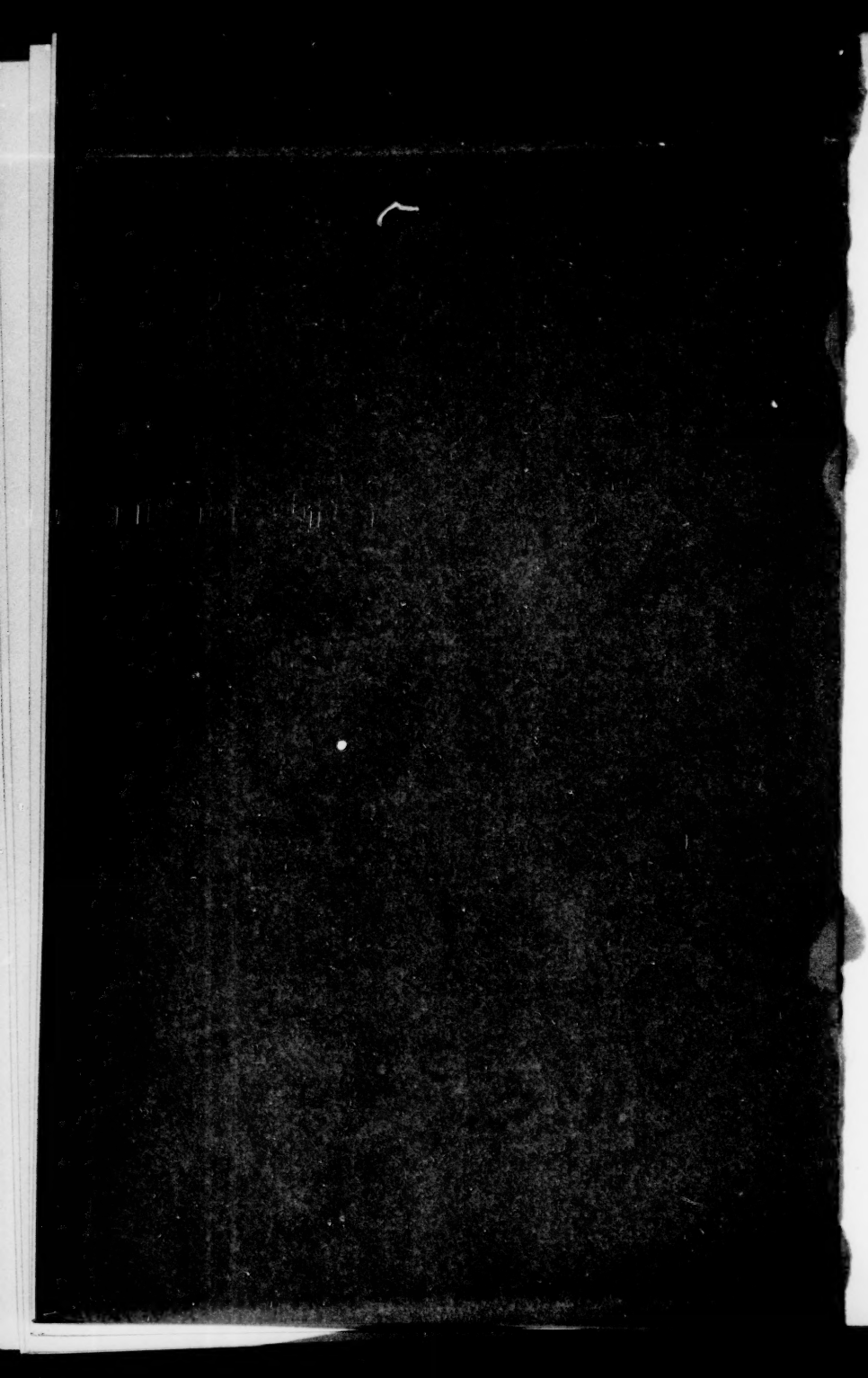
DUDLEY P. ELY,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

W. H. JOHNSON,
Counsel,
Oneonta, N. Y.

ONEONTA, N. Y.
PRINTED AT THE SPY OFFICE.
1895.



United States Supreme Court.

TOWN OF ANDES,
PLAINTIFF IN ERROR,

agt.

DUDLEY P. ELY,
DEFENDANT IN ERROR.

Writ of error by the Town of Andes, the defendant in the court below, to review a judgment entered in the Circuit Court of the United States for the Northern District of New York, in favor of Dudley P. Ely, plaintiff in that Court, and defendant in error here, on the direction of Hon. William J. Wallace, Judge U. S. Circuit Court on the trial of the case before him and a Jury in the month of November, 1890.

The action was brought to trial at a regular circuit of this Court, held at Syracuse, New York, on the 18th day of November, 1890, Mr. John B. Gleason appearing as attorney for the plaintiff in that Court, and W. H. Johnson and Hon. Isaac H. Maynard appearing as attorneys and counsel for the defendant therein. (Folio 31.)

The alleged cause of action was upon coupons cut from bonds claimed to have been issued by commis-

sioners appointed by the County Judge of Delaware county, N. Y., in 1871, to subscribe to the stock of the Delhi and Middletown railroad company and to issue bonds in payment thereof.

The complaint commences at folio 2 of printed papers and continues to folio 19. The answer will be found folio 19 to folio 26.

At the close of the testimony the court was requested in behalf of the defendant below to non-suit the plaintiff there, upon various grounds, which motion was denied. The Court was also asked to hold as a matter of law that no recovery could be had on coupons in suit, which had matured more than six years before the commencement of the action. The Court declined to so hold, and thereupon directed the jury to render a verdict in favor of the plaintiff in that Court, viz: Dudley P. Ely, and against the defendant there, viz: The Town of Andes, for $32,532.63. To all of which rulings and directions said defendant's counsel duly excepted. See page 59 commencing in folio 97 and continuing to and including a part of folio 100.

The jury did thereupon render a verdict in favor of the plaintiff and against the defendant in the Court below for the said sum of $32,532.63, (Folio 100) and judgment was afterwards, viz: on the 31st day of December, 1890 entered and docketed in the office of the Clerk. (See page 17, folio 30).

A writ of error was afterwards sued out by the defendant in the Court below (Folio 112) and a transcript of the record was duly made and filed in this Court.

It will be observed that the answer puts in issue every allegation in the complaint excepting the allega-

tion "that the town of Andes is and for thirty years last past has been one of the towns of the county of Delaware, in the state of New York," which is admitted. Page 12, folio 19.

The bonds were drawn with interest at seven per cent. per annum, payable semi-annually on the first days of March and September in each year. Form of bond appears in the complaint, commencing at the top of page 4, in folio 6. Form of coupons appears in folio 8, page 5.

The coupons involved in this action fell due commencing March 1st, 1882, and ending September 1st, 1889. (Folio 10.)

The summons purports to have been issued December 27th, 1889. (Folio 1); complaint verified December 30th, the same year. Folio 17, page 12.

So that it will appear as to a considerable number and amount of coupons, more than six years had elapsed from the time they fell due, before the commencement of this action.

The proceedings by which it was sought to bond the Town of Andes in aid of the Delhi and Middletown railroad company were taken under chapter 907 of the laws of the State of New York, passed May 18th, 1869. (Session Laws of 1869, page 2303.)

In an action brought by the holder of certain coupons against this same Town of Andes, the Court of Appeals of the State of New York, in October, 1883, held that the bonds were null and void, and no recovery could be had thereon, (Craig v. Town of Andes, 93 N. Y., 405,) upon the ground that the petition filed with the County Judge upon the initiation of the proceedings before him was conditional, and therefore,

conferred no jurisdiction upon that officer to proceed and act under the provisions of the aforesaid chapter 907 of the laws of 1869. There were several other grounds upon which the validity of the bonds was contested in that action, but the Court having found that the proceedings before the County Judge were a nullity for the reason above stated, say, (at page 415) that it is unnecessary to consider the other grounds of defence made by the Town.

The petition presented to the County Judge was upon nineteen pieces of paper which will be found commencing on page 41, in folio 68, and continuing to page 54, in folio 89, and were endorsed with numbers commencing with 1, and ending at 19. (See folio 89.) These papers were all presented to the County Judge at the same time, and were filed by him "May 6th, 1871." (Folio 89-90) and numbers 1, 4 and 14, each contain conditions to the effect that the road should be located by a certain route as therein designated. (The attention of the Court is called to the fact that these papers are each numbered at the end thereof).

One of the papers designated as number 7 had a verification indorsed upon it, which will be found in folio 76.

The petition was filed May 6th, 1871, and on that day the County Judge issued a notice, a copy of which will be found at folio 39, to the effect that he should proceed on the 22d day of May next, at one o'clock to take proofs of the facts set forth in the petition, as to the number of taxpayers joining in such petition, and as to the amount of taxable property represented by them. No place was specified in the notice where the hearing was to be had, nor did the order for the notice

which appears in folios 39 and 40 specify any place of hearing.

On the 22d day of May, 1871, the County Judge made an order in the matter, which will be found on page 25, in folios 40 and 41, adjudging and determining that the petitioners named in the petition represented a majority of the taxpayers of the Town of Andes, as shown by the last preceding tax list and assessment roll, and represented a majority of the taxable property upon such list or roll. On the same day he made a certificate in writing appointing Andrew Hawver, John Dickson and Andrew Armstrong commissioners for the Town of Andes to carry into effect the provisions of the act of 1869, and to issue bonds and take stock in the Delhi and Middletown railroad, (Folio 42). Bonds to the amount of $98,000.00 were issued by the commissioners between November 16th, 1871 and December 11th, 1872, and all were delivered to the treasurer of the railroad company, (Folios 44 to 46 inclusive). Before any of the bonds were issued the railroad company by its president entered into an agreement with the Commissioners that the avails of the bonds were only to be expended and used for the construction and equipment of the road in and through the Town of Andes. (Folio 48). This agreement was not kept; the president of the railroad company afterwards refused to carry it out. (Page 30, folio 49).

The Delhi and Middletown railroad was projected to run from Arkville or Deans to Delhi, through the towns of Middletown, Andes, Bovina and Delhi, Delaware County, (Folios 32 and 48) but was never fully constructed, and no part of it was ever operated. (Folio 49).

A map and profile of the alleged Delhi and Middletown railroad company was filed March 4th, 1871, in the Delaware County Clerk's office with a certificate thereon which will be found at folios 35 and 36, made by the president and chief engineer, who certify that it is a correct map and profile of the route intended to be adopted by said company, etc.

Another map was filed May 1st, 1872, changing the route from Lumberville to Shavertown, from the line as contained in the original map. (See folios 93 and 94).

The railroad stock issued to the Commissioners by the railroad company was cut off by a judgment and sale under foreclosure of a mortgage, executed by the company in 1872; judgment of foreclosure was entered September 18th, 1881, and sale had December 10th, same year; proceeds of sale were insufficient to pay the referee and nothing was realized for the stockholders. The title of the town was extinguished without redemption. (Folio 96.)

The actual distance from one end to the other of this branch railroad is about thirty-one miles. (Folio 96.)

The amount of taxable property represented by the conditional papers constituting a part of the petition which was presented to the County Judge was $65.-960.00, and the number of taxpayers appearing upon the said conditional papers was 48, and the remaining represented less than a majority by $60,000.00, and the number of taxpayers including the conditional paper would be 38 less than a majority, and none of the papers were verified except No. 7. (Folio 96.)

It was conceeded that the signature of Edwin D. Wagner appearing upon the certificate of incorporation

of the Delhi and Middletown railroad company, put in evidence by the plaintiff and filed in the office of the Secretary of State, November 14th, 1870, including the sums purporting to have been subscribed, is the genuine signature and handwriting of the gentleman who was County Judge of Delaware County, at the time of the bonding proceedings, and who made the adjudication. Put in evidence, (Folio 97.)

In February, 1882, the defendant below, the Town of Andes, at its town meeting decided to contest the validity of the said bonds, and since that time has made no payments. (Folio 59.)

As to all of said coupons except those cut from bonds numbers 24 to 25 of $1000 series, and numbers 87 and 156 of $100 series, and amounting to $1,232.00 of coupons, it was proved that the plaintiff's purchases were made after the coupons become due, and that the plaintiff before he purchased any of the said coupons knew that the validity of the bonds and coupons was disputed by the Town of Andes, and that the same were purchased by the plaintiff after the decision of the Court of Appeals in the State of New York, in the case of "Craig against the Town of Andes," reported in the 93d N. Y., at page 405; and as to the remaining $1,232 of coupons it was conceded by the plaintiff that this action must be dismissed as to them, for lack of jurisdiction, provided that it is dismissed as to the others for any cause. (Page 38, folios 62-63.)

Specificaton of Errors.

The following errors are asserted and intended to be urged by the Plaintiff in error:

First. The motion for a non-suit which was made

as appears, commencing on page 59, in folio 97, should have been granted for the several distinct reasons therein set forth as the grounds of such motion, and the Circuit Court erred in denying the same, because

A. The persons or parties from whom the plaintiff purchased the coupons in question could not have maintained this action if no such transfer had been made; consequently under the Federal Judiciary act, of 1887, the Court below had no jurisdiction to entertain the action.

B. It does not appear that the alleged railroad company, in whose aid the bonds purport to have been issued was ever duly incorporated as required by the laws of the State of New York. On the contrary it does affirmatively appear by the articles of association that the company was organized solely for the purpose of constructing a railroad.

C. The petition was insufficient to confer jurisdiction on the County Judge, because it did not allege that the railroad company was a domestic corporation.

D. It appears affirmatively that the ten per cent in cash was not paid as required by the statutes of the State of New York.

E. The plaintiff was not a bona fide holder of the coupons in suit.

F. The alleged judgment declaring the town bonded is void, because no place is designated in the notice published by the County Judge, where he would proceed to take proof and otherwise act on the petition.

G. It appears that the bonds were made payable in less than thirty years from the time when they were actually issued.

H. The amount subscribed to the original stock was conditional as appears by the articles of association.

I. There was not a sufficient amount subscribed to the original stock as required by the statutes of the State of New York, viz: $1,000 per mile.

J. The petition consenting to bond the town was conditional as appears by form of the papers constituting the same, viz:

No's 1, 4, 5, 14 and the remaining papers constitute less than a majority of the taxable property, or of the taxable inhabitants of the defendant, the said Town of Andes.

K. Edwin D. Wagner, the County Judge before whom the adjudication was had under which the Plaintiff claims, was at the time thereof a stockholder in the alleged railroad company, having been one of the original subscribers to the extent of one hundred dollars, and the pretended adjudication is therefore absolutely void for want of jurisdiction.

L. It appears that after the alleged petition was filed, and after the alleged adjudication was made the said railroad company changed the line of its route, so that it became and was materially different from the line as it existed when the petition was filed, and for this reason the bonds, especially those which were issued subsequent to the change, were absolutely void.

Second. For the same reasons as set forth under the first specification, the Circuit Court erred in directing the Jury to render a verdict in favor of the Plaintiff, and against the Defendant in the Court below.

Third. The Circuit Court erred in refusing to hold

and decide as a matter of law that no recovery would be had on coupons in suit, which had matured more than six years before the commencement of the action in that Court.

Fourth. The Circuit Court erred in excluding the testimony offered by Plaintiff in error to show that subscribers to the original stock of the railroad company had never paid anything on their subscriptions.

Fifth. The Circuit Court erred in holding and deciding that the bonds and coupons in question were the valid obligations of the Town of Andes, and that the action brought by the Defendant here could be maintained.

Brief of Points and Authorities.

First.

Under the Federal judiciary act of 1887, chapter 383, 24 Statutes at large, 552 and 553, the Circuit Court has no jurisdiction to entertain the action, because the assignors of the coupons having been residents of the State of New York, could not themselves have maintained the action.

Second.

The alleged railroad company was not duly organized or incorporated as required by the laws of the State of New York, and never had any legal existence.

Rev. Statutes, State of N. Y., 6th edition, vol. 2d, page 519. Section 1, chapter 140, laws of the the State of New York for the year 1850.

THIRD.

The petition which was presented to the County Judge of Delaware county was insufficient to confer jurisdiction on him to take action thereon, for the reason that it did not allege that the railroad company was a domestic corporation.

Session laws of New York 1869, chapter 907, sec. 1, page 2303.; People v. Spencer, 55 N. Y., 1.

FOURTH.

The alleged railroad company had no legal existence, for the reason that as a matter of fact the ten per cent in cash had not actually been paid by the subscribers to the original stock as required by the statutes of the state of New York. Farnham v. Benedict; 107 New York Court of Appeals, page 159.

FIFTH.

The political division known as the Town of Andes had no power to issue its bonds, because there was no existing railroad corporation having power to issue its stocks or bonds in exchange for the bonds of the town.

See Farnham v. Benedict, Supra. 107 N. Y., 159.

SIXTH.

The alleged judgment declaring the town bonded or authorizing the issuing of the bonds is void, because no place was designated in the notice published by the County Judge, where he would proceed to take proof and otherwise act on the petition.

Stewart v. Smith, 17 Wendel, N. Y., 517; Chapter 907, laws of 1869, Supra.

SEVENTH.

The alleged bonds are void because they were made payable in less than thirty years from the time they were actually issued.

N. Y. Statute of 1869, chapter 907, section 4.

EIGHTH.

The alleged railroad company was not duly organized or incorporated for the reason that there was not a sufficient amount subscribed to the original stock as required by the Statutes of the State of New York.

Chapter 140, Session laws of New York for the 1850, section 2.

NINTH.

The County Judge of Delaware County did not acquire jurisdiction over the subject matter of the alleged adjudication, for the reason that the petition which was filed as the foundation of the proceedings was a conditional one, and such a petition under the laws of the State of New York is insufficient to confer jurisdiction.

The People v. Adirondack R. R. Co., 57 Barb. 661; Craig v. Town of Andes, 93 N. Y. 405; Butternuts and Oxford Turnpike Co. v. North, 1st Hill, 518; Troy and Boston R. R. Co. v. Tibbitts, 18 Barb. 298; Fort Edward and Fort Miller Plank Road Co. v. Payne, 15 N. Y., 583; McClintock v. Criswell, 5 Penn. St., 183; Vatcher v. Espen, 99 id. 313.

TENTH.

The proceedings the before County Judge of Delaware County were a nullity, and his adjudication void for the reason that he was a stockholder of the Delhi and Middletown railroad company, in aid of which the proceedings were taken.

See 3rd Rev. Statutes, 6th ed. page 436, section 2; also page 437, section 8; N. Y. Laws of 1847, chapter 280, section 81; Washington Ins. Co. v. Price, Hop. chapter 1; Jewell v. Albany City Bank, Clark, Ch. R. 179; Darling v. Pierce, 15 Hun. N. Y., 542; Wigand v. Dejonge, 8 Abb. N. C., 260.

ELEVENTH.

The bonds purporting to have been issued by the Town were void because the said railroad company changed the line of its route after the time of the filing of the petition with the County Judge, so that the route become and was materially different from that which existed when the petition was filed.

TWELFTH.

As to the sufficiency of the petition and the facts which must be stated therein, in order to invest the County Judge with jurisdiction of the proceedings, the laws of New York upon the subject, and the decisions of the courts of that State concerning such laws will be adopted and followed by this Court.

Shelly v. Groy, 11 Wheat, 367; Supervisors v. U. S., 18 Wall, 71; Richmond v. Smith, 15

Wall, 429; Bailey v. Maguire, 22 Wall, 230; Buchen v. Chesire R. R. Co., 125 U. S., 555; Township of Elmwood v. Marcy, 92 U. S., 289; Township of East Oakland v. Skinner, 94 U. S. 257; Fairfield v. Collating Co., 100 U. S., 47; Past v. Supervisors, 105 U. S., 667.

THIRTEENTH.

The defendant is not a bona fide holder of the bonds and coupons in suit. He is chargeable with notice of the insufficiency of the petition and want of jurisdiction of the County Judge.

Town of South Ottaway v. Perkins, 94, U. S. 262; 13 Wall. 297, 16 Id. 452 and 644, 92 U. S., 484; McClure v. Township of Oxford, 94 U. S. 432; Ogden v. County of Daviess, 102 U. S., 634; Anthony v. County of Jaspar, 101 U. S., 669; Hoff v. Jasper County, 110 U. S., 53; Stewart v. Lansing, 104 U. S., 505; Smith v. Sac County, 11 Wall, 139; Cowdry v. Town of Canada, 16 Federal Reporter, 532.

FOURTEENTH.

There are no recitals in the bonds which estops the Plaintiff in error from alleging the want of jurisdiction of the County Judge to act in the matter.

County of Warren v. Marcy, 104 U. S., 97; Buchannan v. Leichfield, 102 U. S., 278; School District v. Stone, 106 U. S., 183; Carroll County v. Smith, 111 U. S., 556; Daviess County v. Dixon, 117 U. S., 657; Northern Bank v. Porter Township, 110 U. S., 608; Dixon County v. Field, 111 U. S., 83.

Fifteenth.

The payment of interest upon the bonds by means of forced tax levies upon the taxable property of the Town does not estop Plaintiff in error from now insisting upon their invalidity, the defect in their issue being such that all persons are chargeable with notice thereof.

Purdy v. Town of Lansing, October Term, 1888; Cowdry v. Town of Canada, 16 Federal Reporter, 532; Thomas v. Town of Lansing, 14 Federal Reporter, 618.

ARGUMENT.

First.

The amendment of the Federal Judiciary Act of 1887, Chapter 383, 24 Statutes at large, 552-3 deprives the Court of jurisdiction where the case is brought by a subsequent holder of the chose in action, if the former holder could not maintain the case.

This act of 1887 makes a very important change in the act of 1875 in this respect. (18 Statute, 173.) This latter act only prohibited jurisdiction in case of an assignee where the assignor could not maintain it, but the act of 1887 also adds a "subsequent holder," to the prohibited class, but excepts instruments made by a corporation. The Town, however, is not a corporation under the statutes and decisions of the State of New York, but is a political division.

"The several towns in this State are corporations for certain special and very limited purposes, or to speak more accurately they have a certain limited corporate

capacity. They may purchase and hold lands within their own limits for the use of their inhabitants. They may, as a corporation make such contracts and hold such personal property as may be necessary to the exercise of their corporate or administrative powers, they may regulate their corporate property, and as a necessary incident may sue and be sued, where the assertion of their corporate rights, or the enforcement against them of their corporate liabilities, shall require such proceedings. In all other respects, for instance in everything which concerns the administration of civil and criminal justice, the preservation of the public health or morals, the conservation of highways, roads and bridges, the relief of the poor, and the assessment and collection of the taxes, the several towns are political divisions organized for the convenient exercise of portions of the political power of the state; and are no more corporations than the judicial, or the senate or assembly districts."

Lorillard v. Town of Monroe, 11 N. Y. Court of Appeals, page 392.

SECOND.

The bonds which are the subject of this controversy were unlawfully issued and used, for the reason that there was no proof of the true incorporation of the Delhi and Middletown R. R. Co. On the contrary it affirmatively appears that it was never a railroad company "*De Jure*."

The articles of association which are given on page 18, commencing in Folio 32, contain the names of the incorporators, and the number of shares subscribed by each.

The length of the proposed road is stated at twenty-five miles, but the number of shares unconditionally subscribed is only $21,800, being $3,200 less than $1,000 per mile.

There are conditional subscriptions to the amount of $2,000, provided the railroad is located through Lumberville, and $2,400 if the road goes by Shavertown, in all $4,400, but these subscriptions it is submitted are void and cannot be counted.

Butternuts Turnpike Co., v. North, 1 Hill, 518; Troy and Boston R. R. Co. v. Tibbitts, 18 Barber, (N. Y.), 297; Fort Edward, etc., Plankroad Co. v. Payne, 15 N. Y., Court Appeals, 583; Craig v. Town of Andes, 93 N. Y. 405; Farnham v. Benedict, 107 N. Y., 159.

In Troy & Boston R. R. Co. v. Tibbitts (Supra) the Court, per Wright, J., at page 307 says: "The law of 1848 confers no power to make conditional subscriptions, and such a thing is contrary to public policy."

And in Fort Edward etc. Plankroad v. Payne, the N. Y. Court of Appeals, referring to a subscription of this character conditioned upon a specific location of the route of the proposed road, say: "That it is wholly void by reason of the condition therein contained."

But counting all the subscriptions, both conditional and unconditional, the articles of corporation are fatally defective, because they do not amount to $1,000 per mile for the length of road to be constructed.

The actual distance between the termini of the proposed railroad was thirty-one miles. The map and profile of the located route put in evidence by defendants in the court below, together with concessions of counsel for plaintiff in the court below, shows that

such was the fact, (See page 58 of case, Folio 96). The incorporators should have been subscribers to the stock to the amount of $31,000, and that fact should have appeared upon the articles of association, which became the articles of incorporation under the 1st and 2d sections of the railroad act.

But the total amount of subscriptions of all kinds is only $26,800; $4,200 short of the required amount. This point is fully covered by the decision of the Court of Appeals of the State of New York in Farnham v. Benedict (107 N. Y. 159.)

It was there held that "under the general railroad act, (Chap. 140, Laws of 1850), the mere filing of articles of association does not constitute a corporation *De Jure*. There must be a performance of the conditions precedent, i. e., a stock subscription of at least $1,000 per mile for every mile of railroad proposed to be constructed, and a payment thereon of 10 per cent in good faith and in cash. Under the town bonding act of 1869, (Chap. 907, Laws of 1869), the existence of a railroad corporation having power to issue stock or bonds, and to construct the road to be aided, lies at the foundation of the power to issue the municipal bonds."

THIRD.

The insufficiency of the petition to confer jurisdiction on the County Judge of Delaware County, because of its omission to state that the Railroad Company was a domestic corporation is made manifest by reference to the statute under which it is claimed that the proceedings were instituted for bonding the town. The statute itself requires that this fact shall be expiicitly

averred. (See N. Y. Session Laws of 1869, Chapter 907, Section 1.)

The allegation in the petition is that the Railroad Company is an association formed in said County and State. (See page 22 of case in Folio 37.)

This is not equivalent to an averment that it is "a corporation" within the State.

The term association is not synonymous with that of corporation either in legal or popular parlance.

It impliedly refutes the inference that it is a corporation at all, and almost necessarily implies that it is a voluntary combination of individuals formed in the County of Delaware.

Wherever the word association is used in the law books it is used to denote a body of persons in contra distinction to a corporation. The statute requires the fact that it is a domestic corporation to be explicitly alleged. In the case of the People vs. Spencer, 55 N. Y. Court of Appeals, Page 1; it was held distinctly that among other things it must appear in the petition, that the Railroad Company in aid of which the bonds were to be issued is a Railroad Company *in this State*, and if that fact does not appear the petition is fatally defective. It is therefore insisted upon the part of the plaintiff in error, that the petition in this case was fatally defective because it appears on the face thereof that instead of being a Railroad Company it was an "association" formed in said County and State. At page 4 of the case last cited the Court says: "The jurisdiction of the County Judge to exercise the authority conferred by the act under which the proceedings were instituted for bonding the town of Greenwood, depended upon the presentation to him in the first

instance of a petition in conformity with the act. (Being the same act under which it is claimed that the Town of Andes was bonded.) The County Judge is invested with a special limited statutory power which can only be exercised under the limitations and circumstances prescribed in the statute. The presentation of a proper petition lies at the basis of his jurisdiction. If any facts required to be stated are omitted, all the subsequent proceedings are fatally defective. It does not aid the proceedings that the facts exist or that they are in some other way or at another stage of the proceedings brought to the knowledge of the officer, or that the statement of them may seem unnecessary, in view of the inquiry and adjudication which he is authorized to make. The statute prescribes the proof which is to be presented to the County Judge. It is material because the statute requires it. It must be presented in the form and at the time required or the officer acquires no jurisdiction." Citing (Vosburgh v. Welch, 11 J. R. 175; Adkins v. Brewer, 3 Cow. 206; Bloom v. Burdick, 1 Hill, 130.) Again in the same case the courts say: on page 5 "The fact that the Railroad Company named is a corporation within this State must we think be stated in the petition." See also People v. VanValkenburgh, 63 Barber, 105; People v. Adirondack Co., 57 Barber, 661; People v. Franklin, 5 Lansing, (N. Y.) 129.

FOURTH.

As has already been suggested the notice published by the County Judge of Delaware County was fatally defective in not specifying a place where the hearing was to be had as required by the Session laws of 1869.

hereinfore specified. The second section of the act provides that it shall be the duty of the County Judge at the time and place named in *said notice* to proceed and take proof, etc. This is the only grant of authority to the County Judge to proceed and take proofs which the act contains, and this grant is upon condition that the hearing shall be had at the "place named in said notice." If no place is named then legislation has not conferred on him any authority to proceed and take proof, etc.

In this proceeding the County Judge does not sit as a court holding its session at a stated place fixed by the statute, but he acts as a judicial officer of special and limited jurisdiction and can only act in the method pointed out by statute. Under the laws of the State of New York the County Judge can have any matter brought before him at any place he may designate within the County, nor is he required by law to have an office in any specified place in the County, and hence the place of hearing cannot be supplied by reference to any statutory provision upon the subject. This notice is the only process required to be served upon the taxpayers, and service by publication of ten days only is all the service that is required, and it should contain all the requisites of a valid process. Certainly as great particularity should be insisted upon as in case of a summons in Justice's court. Nor does the order directing the publication of the notice specify any place of hearing. (Folio 39, page 24.)

FIFTH.

None of the bonds in question were actually issued until the 16th day of November, 1871. (See page 27,

folio 44) at which time $9,000 worth at face value were delivered to the Treasurer of the Railroad Company, (Folio 45). December 6th, 1871, there was issued and delivered bonds to the amount of $24,000 to Thomas Cornell, President of the Company, and no more were issued until June 13th, 1872. Said bonds were payable on the first day of September, 1901, which was less than thirty years from the time they were actually issued, and this was clearly in violation of the provisions of the statute.

SIXTH.

The petition which was filed as a foundation of the proceedings by which it was attempted to bond the town having been "conditional," as hereinbefore specified the County Judge was entirely without jurisdiction. The case of Craig v. The Town of Andes, reported in the 93d N. Y., Court of Appeals, at page 405, seems to be conclusive upon this question and is directly in point. That action was brought to recover the amount of certain coupons alleged to have been cut from bonds alleged to have been issued by the plaintiff in error, in aid of the construction of the Delhi and Middletown Railroad, and it was there clearly and distinctly held that a recital in the bonds purporting to have been issued by the town under the act of 1869, in aid of the Railroad Company, to the effect that all necessary legal steps have been taken to comply with the statute does not estop the town from questioning the validity of the bonds, even in the hands of the bona fide holder, and that the judgment of the County Judge in proceedings under said statute to bond the town may be questioned for want of jurisdiction.

This decision it is respectfully submitted covers the precise question involved here, and relates to the same special matter. The same kind of coupons cut from the same kind of bonds, issued at the same time, and upon the same authority. Upon the assumption that this Court will follow the decision of the highest tribunal in the State where the controversy arises, it seems to us that there can be no reason to doubt that there must be a reversal of the decision of the Circuit Court which is under review at this time. The foregoing is believed to be the law of the State of New York to-day, as expounded by its court of last resort.

In the cases of the "Town of Lyons v. Chamberlin," 89 N. Y., 585; and of "Cagwin v. Town of Hancock," 84 N. Y., 532, it was distinctly held that one who takes such instruments, although in good faith must see to it that they are authorized by the statute under which they purport to have been issued, and a number of cases are cited in the opinion of Danforth, J., to which the attention of this Court is respectfully directed. In the case of "the City of Brenham, plaintiff in error against the German-American Bank," decided March 28, 1892, in this Court, and with which this Court is undoubtedly familiar, holds as we construe the decision, that as there was no authority on the part of the City to issue the bonds, even a bona fide holder of them could not have the right to recover upon them or their coupons." Citing "Marsh v. Fulton County, 10 Wall, 676; East Oakland v. Skinner, 94 U. S., 255; Buchannan v. Litchfield, 102 U. S., 278; Hayes v. Holly Springs, 114 U. S., 120; Davies County v. Dickinson, 117 U. S., 657; Hopper v. Covington, 118 U. S. 148-157; Merrill v. Monticello, 138 U. S., 673, 681-682."

It is no doubt true that the decision in the "City of Brenham case" was based upon the want of power upon the part of the City to incur such indebtedness even though proceedings had been taken in compliance with the provisions of local statutes; but in the case at bar, the same want of power may be invoked by plaintiff in error unless it can be shown that every essential provision of the enabling statute has been complied with. In other words there is no presumption to be indulged in in favor of the element of power on the part of the town to create an indebtedness, which places that which is equivalent to a mortgage upon every dollar of its taxable property, to rest and remain thereon for more than a generation thereafter, so that the burthen rests not only upon the taxpayers of that generation, but also upon their children.

SEVENTH.

There is and can be no dispute that the County Judge of Delaware County at the time the proceedings were had before him was a stockholder of the association known as the Delhi and Middletown Railroad Company: his name appears as one of the subscribers to the stock on page 19 of the case. The 19th name on the list of subscribers, residence Delhi; one share $100. As such stockholder he was naturally and necessarily interested in the result of the proceedings which were instituted and carried on before him for the bonding of the town, because those proceedings were in aid of this corporation or association, or by whatever name it may properly be designated. The Revised Statutes of the State of New York provide "that no judge of any Court can sit as such in any cause to which he is a party, or

in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties," etc. That a judical officer should be permitted to adjudicate or in any manner pass upon questions in which he has a financial interest is contrary to public policy and utterly inconsistent with the idea of fairness which ought to prevail in all such cases. In other words, the principle invoked is primary, and so far as we know has never been questioned in any judicial proceedings. It has frequently been held that the effect of a legal disqualification is to render the judgment void. See Chambers v. Clearwater, 1st Abb. Court of Appeals, (N. Y.), 341; Schoonmaker v. Clearwater, 41 Barber 200; Foot v. Morgan, 1 Hill, 564; Birdsall v. Fuller, 11 Hun. 204. A person thus disqualified cannot sit even with the consent of the parties, citing: Oakley v. Aspinwall, 3rd N. Y. 547.

It is true that the County Judge of Delaware County testified in substance that he was never a stockholder in the Delhi and Middletown Railroad Company, but on his cross-examination he conceded that he signed for one share of the stock, (see page 41, folio 68), and on the trial in the court below the plaintiff's counsel conceded that the signature of Edwin D. Wagner appearing upon the certificate of incorporation of the Delhi and Middletown Railroad Company, put in evidence by the plaintiff, and filed in the office of the Secretary of State, November 14th, 1870, including the name purporting to have been subscribed, is the genuine signature and handwriting of the gentleman who was County Judge of Delaware County at the time of the bonding proceedings, and who made the adjudication put in

evidence. So it is submitted that for all intents and purposes he thereupon became a subscriber to the stock of the Railroad Company, liable to pay his assessment, and entitled to dividends if any there should be, and such were his relations to that corporation at the time he made the adjudication upon which the plaintiff in the court below relied for authority to issue the bonds in question.

EIGHTH.

Recurring to the question as to whether or not the defendant in error was a bona fide holder of the coupons upon which the recovery was had, the attention of the Court is respectfully called to Page 38 of the case in Folios 62-63, where it appears that "as to all of said coupons except those cut from bonds No. 24 and 25 of $1000, and Nos. 87 and 156 of $100, and amounting to $1,232 of coupons, it was proved that the plaintiff's purchases were made after the coupons became due and that the plaintiff before he purchased any of said coupons knew that the validity of the bonds and coupons was disputed by the town of Andes, and that the same were purchased by the plaintiff after the decision of the Court of Appeals of the State of New York in the case of "Craig v. Town of Andes," reported in 93d New York at page 405, and as to the remaining $1,232 of coupons it was conceded by the plaintiff that this action must be dismissed as to them, for lack of jurisdiction, provided that it is dismissed as to the others for any cause."

To claim the protection of a bona fide holder it must be shown that the defendant was the purchaser of them for value before maturity and without notice. All

these conditions are wanting in this case. But aside from any question of actual notice under all the decisions upon the subject, the defendant in error must be charged with notice that the petition which was presented to the County Judge was unauthorized by law and was insufficient to confer jurisdiction upon that officer.

In McClure v. Township of Oxford (94 U. S., 432), it was held that every dealer in municipal bonds which upon their face refer to the statute under which they were issued is bound to take notice of the statute and all of its requirements. In that case the bonds were issued, and it was so stated upon the face of them, in pursuance of a certain act of the Legislature of the State of Kansas, which authorized the issuance of the bonds if a majority of the electors of the township should consent thereto at a special election to be held for that purpose upon thirty days' notice. The act was approved March 1, 1872, but was to take effect from and after its publication in the Kansas Weekly *Commonwealth*, which it seems occured on March 21, 1872. The bonds recited on their face that the act was approved March 1, 1872, and that the town meeting was held on the 8th day of April, 1872, and that a majority of the electors voted to consent to issue the bonds, and Chief-Justice Waite, in delivering the opinion of the Court, at page 432 says:

"Municipal officers cannot rightfully dispense with any of the essential forms of the proceedings which the Legislature has prescribed for the purpose of investing them with power to act in the matter of such subscription." * * * "Every man is chargeable with notice of that which the law requires him to know, and of what which, after being put upon inquiry, he might have as-

certained by the exercise of reasonable diligence. In the present case, as it was stated in the act that it was not to go into effect until after its publication in the newspaper, every purchaser of the bonds had notice. Because it was a part of the statute he was bound to take notice of it, and he would therefore be put upon inquiry as to the time of publication, and could by reasonable diligence have ascertained that this did not take place until March 21st."

In the present case the defendant in error is charged with notice of the provisions of law under which it was attempted to issue these bonds, and that the presentation of the proper petition to the County Judge was essential in order to give him any authority to act at all in the matter. He was also charged with notice that under the law the County Judge could not pass upon the sufficiency of the petition; that he could not confer jurisdiction upon himself by simply deciding that he had it, and that under the act of 1869 the only authority that he had was to adjudge and determine, *first*, whether a majority of the tax-payers of the town of Andes had signed the petition, and *secondly*, whether they represented a majority of the taxable property of the town. The defendant was as truly chargeable with notice that the petition was defective and insufficient to confer authority upon the County Judge to act as he would have been chargeable with notice of the want of jurisdiction in that officer in case he had proceeded to make an adjudication without the presentation of any petition at all. A petition substantially defective or unauthorized by law is as unavailing for the purposes of protection as the entire absence of a petition. The record of the proceedings is a public one, to which all may have access, and it was the duty of every purchaser

of the bonds, in case he desired to be protected as a *bona fide* holder, to examine the record so far as it might be necessary to ascertain whether jurisdiction had been conferred upon that officer to act under the provisions of the law in question.

In Anthony v. County of Jasper (101 U. S., 697) it was held that dealers in municipal bonds are charged with notice of the laws of the State granting power to make the bonds they find on the market and hence in that case it was held that the purchaser of such bonds was bound to take notice of a provision of the law which required the bond to be certified to and countersigned by the Auditor of the State before its delivery.

And in Ogden v. County of Daviess (102 U. S., 641) the principle was re-affirmed the Court saying: "We have always held that every holder of municipal bonds is chargeable with notice of the law by which his bond was authorized."

In Huff v. Jasper County (110 U. S., 53) the Supreme Court re-affirmed its decision in the case of Anthony v. County of Jasper (101 U. S., 693), holding that innocent holders for value are charged with the duty of knowing the law under which the bonds purport to have been issued, and of inquiring whether the conditions prescribed by the law have been complied with. The rule is also well settled that where there is any illegality in the inception of the instruments the transferree of the paper, in order to recover, must prove that he is himself a *bona fide* holder for value before maturity, and without notice.

Stewart v. Lansing, 104 U. S., 505; Smith v. Sac County, 11 Wall., 139.

In the case of Cowdrey v. Town of Canadea, decided

June 1, 1883 (16 Fed. Rep., 532), the precise question arose which is involved in this case, namely, whether a purchaser of muncipal bonds was chargeable with notice of defects in the petition by reason of which the County Judge failed to acquire jurisdiction of the proceeding, and the Court, Wallace, Justice, held that "purchasers of muncipal bonds executed by agents must ascertain at their peril that the delegated authority assumed has been conferred." The proceedings in that case were under the act of 1871, chapter 925, amending the act of 1869, which required that the petition should allege that the petitioners were a majority of the tax-payers, excluding those taxed for dogs and highway purposes only, and the Court on the same page further say:

"These acts authorizing muncipal corporations to aid in the construction of railroads delegate to a portion of the tax-payers of a muncipality the power to create a debt against the consent of other taxpayers, and subject the property of all to taxation for its payment. The special character of the jurisdiction exercised by the County Judge, and the nature of the power invoked by the tax-payers who set the proceeding in motion, both require that the proceeding be strictly pursued. The authority of a majority of the tax-payers of a town to incumber the property of a minority, against their will, in aid of a railroad or other corporation, receives no countenance from the principals of the common law. Every step, therefore, required by the statute must be in strict conformity therewith. (People v. Hurlburt, 46 N. Y., 110.) The rule is also inflexible that when a court or judicial officer exercises a special statutory power outside the scope of the usual jurisdiction of the courts of general powers, the record of the proceedings must show that the statutory authority has been pursued; and in this regard the proceedings are on the

same footing with those of limited and inferior jurisdiction." (Citing Denning v. Corwin, 11 Wend., 647; Thatcher v. Powell, 6 Wheat, 119; Dyckman v. New York, 5 N. Y., 434; Betts v. Bagley, 12 Pick., 572; Town of Huntington v. Town of Charlotte, 15 Vt., 46; Morse v. Presby, 25 N. H., 299.)

In the Township of East Oakland v. Skinner (94 U. S., 255,) the Court, at page 258, make very clear the distinction between a case where jurisdiction has not been acquired and where there has been some irregularity in the exercise of the authority conferred. In that case the constitution of the State prohibited the issuing of bonds except they had been authorized under existing laws by a vote of the people of the town prior to their issue. There had been a vote taken, but not pursuant to any existing law upon the subject, and the Court, at page 258, say:

"We have held that there can be *no bona fide* holding where the statutes did not in law authorize the issue of the bonds. The objection in such case goes to the point of power. There is an entire want of jurisdiction over the subject. It is not the case of an informality, an irregularity, fraud, or excess of authority in an authorized agent. Where there is a total want of authority to issue the bonds, there can be no such thing as a *bona fide* holding."

In Northern Bank of Toledo v. Porter Township Trustees, &c. (110 U. S., 608) this court reviews all of the leading cases upon the question of the extent to which a muncipal corporation is estopped by the recitals in the bond against a *bona fide* purchaser, and at page 616 the Court, by Mr. Justice Harlan, say:

"The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a

bona fide holder, to question, in face of a recital in the bonds of their existence, where those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action, in issuing the bonds, but, equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it."

And hence it was held in that case that the certificate upon the face of the bonds that they were issued in part payment of a subscription to the capital stock of the railroad company made by the township in pursuance of the provisions of the several acts of the General Assembly of the State of Ohio, and of a vote of the qualified electors of the said township of Porter taken in pursuance thereof, did not estop the township from showing that the electors had no authority to vote upon the proposition because it was a condition precedent to their right to so vote that the County Commissioners should have refused to submit a similar proposition to the electors of the county for their determination.

In Dixon County v. Field (111 U. S., 83) this Court again reviewed the question, and the rule was there stated to be that a recital in a municipal bond of facts which the corporate officers had authority by law to determine and to certify estops the corporation from denying those facts, but a recital there of facts which the corporate officers had no authority to determine, or a recital of matters of law, does not estop the corporation, and at page 93 the Court, by Matthews, Justice, say:

"If the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be, that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the exercise of such power might be put to proof of the fact, made a condition of its lawfulness, notwithstanding any recitals in the instrument."

In the present case the question relates to the sufficiency of the petition presented to the County Judge, which lies at the foundation of his jurisdiction of the proceeding, and that question is not one which that officer is authorized by law to determine nor which the commissioners have authority to pass upon. It is a question which must be determined by reference to the record itself, and if the petition is one not authorized by the laws of the State under which the proceedings is begun, all persons are bound to take notice of its defective character.

NINTH.

The defendant in error is not aided by the recitals in the bonds in question. The recital is in the following language: "Issued by virtue of an act of the Legislature of the State of New York entitled 'An act to authorize the formation of railroad corporations and to regulate the same, passed April 2, 1850,' and an act to amend an act entitled 'An act to authorize the formation of railroad corporations and to regulate the same, passed April 2, 1850,' so as to permit municipal corporations to

aid in the construction of railroads, passed May 18, (1869,) sixty-nine three-fifths being present.

"These acts authorize any city or town, except in the counties of New York, Kings, Erie, Greene, Albany, Westchester, Ontario, Seneca, Yates, Onondaga, and Niagara to subscribe to the stock of any railroad corporation formed in pursuance of said acts, and these acts authorize the town of Andes to subscribe to the stock of the Delhi and Middletown Railroad Company, and to issue town bonds in payment thereof, all necessary and legal proceedings having been taken and had under said acts."

This is simply a statement that the bonds purport to be issued under the act referred to, and there is no fact alleged which the commissioners had authority to determine. The extent to which any of the authorities go is to hold that where the commissioners who issue the bonds, or where a court or other officer has authority conferred upon him or them by law to determine whether certain conditions precedent have been complied with, the certificate or a recital in the bond that such conditions had been complied with would be regarded as sufficient to protect a *bona fide* holder and estop the corporation from subsequently asserting as against such holder that the conditions had not been complied with. But all the authorities agree in holding that the town is not estopped by the recitals in the bond, except as to those facts connected with or growing out of the discharge of the ordinary duties of its officers who were authorized to execute the bonds and facts which they were to determine before the bonds were issued. (Buchanan v. Litchfield, 102 U. S., 278; School District v. Stone, 106 U. S., 183; Carroll

County v. Smith, 111 U. S., 556; Daviess County v. Dixon 117 U. S., 657.)

We think that no case can be found where recitals in the bonds were held to estop the corporation, unless they were made by officers who had authority by law to ascertain and determine whether the facts existed which are recited in the bonds. The rule in this respect we believe is correctly stated by this Court, per Bradley, Justice, in County of Warren v. Marcy, at page 104, 97 U. S.: "We have substantially held that if a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds themselves, *by the authorities whose primary duty it is to ascertain it.*"

In that case the bonds were executed by the Board of Supervisors of the county, and they were authorized by law to determine whether a majority of the legal voters of the county had consented to issue the bonds at a special election called for that purpose, and they stated or recited in the bond that such election had been held, and that the bonds were issued in conformity with the vote of the electors thereat.

So in Insurance Company v. Bruce (105 U. S., 328) the recitals were made by the supervisor and town clerk, and they were facts which by law they were authorized and required to determine and to certify; and in Nauvoo v. Ritter (97 U. S., 389) the recitals were made by the common council of the city in an an ordinance authorizing the issuing of the bonds and

printed on the back of the bond, and the recital was as to facts which they were by law authorized to determine.

But in the present case the recital is made by commissioners who are not officers of the town, and who are appointed by the County Judge for a specific purpose, and who have no authority to do anything or to bind the town in any respect, except so far as they are specially authorized by the act under which they were appointed. They had no authority to determine whether the petition which was presented to the County Judge was sufficient to confer jurisdiction upon him to act in the matter, and hence any recital or certificate which they might make to that effect would be a nullity. The purchaser of the bonds is bound to take notice of the statutory authority of the commissioners.

It may be said that the case of Lyons v. Munson (99 U. S. 684) is in conflict with the views here expressed, but the point here made does not seem to have been there considered. There was a recital upon the face of the bond that it was not only issued under the authority contained in the act of 1869 and the amendments thereto, but under and pursuant to a judgment of the County Judge of Wayne County duly rendered and entered of record under and pursuant to a petition of the taxpayers of the town. The opinion of the Court is very brief, but it is apparent that the case was made to turn upon the fact that there was a recital upon the face of the bond that the judgment of the County Judge was duly rendered, &c. But none of the cases referred to go to the extent of holding that the commissioners can determine whether the County Judge had jurisdiction of the proceedings or not, and they are all cases where

the recital was made by an officer who had authority to ascertain and determine whether the facts alleged were true.

In Lynde v. The County (16 Wall., 6) the recital was to the effect that the bonds were issued in accordance with a vote of the county, and it was made by the County Judge, who, by the law of Iowa, was required to cause the vote to be taken, and to ascertain and declare the result.

In Mercer County v. Hacket (1 Wall., 83) the recital was by the County Commissioners, who had authority to determine whether the conditions prescribed by law had been complied with. And the same is true in the case of The Commissioners of Knox Co. v. Aspinwall (21 How., 539).

In Township of Rock Creek v. Strong (96 U. S., 271) the case turned upon whether a majority of the electors had voted in favor of the issue of bonds, and as it appeared that it was made the duty of the commissioners of the county to canvass the vote and certify the result and they had certified that a majority of the qualified electors voting had voted in favor of the proposition, it was held that their certificate was conclusive where the bonds had passed into the hands of a *bona fide* holder.

It will thus be seen that in all the cases, with the possible exception of Lyons v. Munson, the officers making the recitals were those who were charged by law with the duty of ascertaining and determining whether the conditions of the law had been complied with.

In the later decisions upon the subject this Court has more clearly stated the rule.

In School District v. Stone (106 U. S., 183) where

the bonds were issued by school district trustees by authority of an election of the voters of the school district held by them, and where the bond contained a recital that "it is issued by the Board of School Directors by virtue of an election of the voters of said school district, held on the 31st day of July, 1869, in conformity with the provisions of chapter 98 of acts 12th General Assembly of the State of Iowa," it was held that the district was not estopped by the recitals from showing that the indebtedness created by the issue of bonds was in excess of the amount permitted by the State constitution, although such amount was to be ascertained by the last State and county tax-list previous to incurring the indebtedness, and the Court say that the rule in regard to the effect of recitals should receive strict construction where it is proposed to exclude inquiry as to whether the bonds were in violation of the provisions of the constitution or of the statute, of the provisions of which all must take notice. The Court also say, at page 187:

"We are unwilling to enlarge or extend the rule, now established by numerous decisions. Sound public policy forbids it. Where the holder relies for protection upon mere recitals, they should, at least, be clear and unambiguous, in order to estop a municipal corporation, in whose names such bonds have been made, from showing that they were issued in violation, or without authority, of law."

In Carroll County v. Smith (111 U. S., 556) there was a recital in the bonds that it was authorized by several statutes of the State, which were referred to by their title, but this Court held that such recital did not estop the municipality from showing that the issue was not authorized by a vote of two-thirds of the voters of

the corporation as required by the constitution of the State, and the Court held that the recital simply served to point out the particular laws under which the transaction might lawfully have taken place.

In Northern Bank v. Porter Township (110 U. S., 608) the cases relating to this point are examined and reviewed, and the Court holds "the facts which a municipal corporation, issuing bonds in aid of a railroad, is not permitted, against a *bona fide* holder, to question, in face of a recital in the bonds of their existence, are those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued."

The recitals in that case stated that the bonds had been issued "in pursuance of the provisions of the several acts of the State of Ohio, and of a vote of the qualified electors of said township of Porter taken in pursuance thereof."

Counsel for the bondholders argued that this recital imported a compliance in all respects with the law, and, therefore, the township will not be allowed, against a *bona fide* holder for value, to say that the circumstances did not exist which authorized it to issue the bonds. But the Court decline to assent to this proposition, although stating on page 615 that it could not be denied that there are general expressions in some former opinions which, apart from their special facts, would seem to afford support to this proposition in the general terms in which it was presented. But (quoting from 6 Wheat., 264, and 16 How., 275, 287) they say "it is a maxim not to be disregarded that general expressions,

in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

In Daviess County v. Dickinson (117 U. S., 657) the bonds were issued by the County Court, and the County Judge endorsed upon each a certificate that it was issued pursuant to a certain act of the Legislature of Kentucky, and was authorized by an ordinance of the County Court, and the Court held that the certificate did not estop the county from showing that the issue of the bonds in question was unauthorized. At page 664 they say: "Neither the statute, nor the vote of the people, nor the order of the County Court empowered him to make such a certificate, or to determine the question whether the County Court had exceeded the power conferred upon it. An officer's certificate of a fact which he has no authority to determine is of no legal effect" (citing Dixon County v. Field, 111 U. S., 83.)

In this latter case the proposition is very clearly stated as follows: A recital in a municipal bond of facts which the corporate officers had authority by law to determine and to certify estops the corporation from denying those facts, but a recital either of facts which the corporate officers had no authority to determine or a recital of matters of law does not estop the corporation.

The court say, at page 92:

"Of course, this does not extend to or cover matters of law. All parties are equally bound to know the law; and a certificate reciting the actual facts, and that

thereby the bonds were conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law. Otherwise it would always be in the power of a municipal body, to which power was denied, to usurp the forbidden authority, by declaring that its assumption was within the law. This would be the clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself.

"And the estoppel does not arise, except upon matters of fact which the corporate officers had authority by law to determine and to certify. * * * But it still remains, that there must be authority vested in the officers by law as to each necessary fact, whether enumerated or non-enumerated, to ascertain and determine its existence, and to guarantee to those dealing with them the truth and conclusiveness of their admissions. In such a case the meaning of the law granting power to issue bonds is, that they may be issued, not upon the existence of certain facts, to be ascertained and determined whenever disputed, but upon the ascertainment and determination of their existence, by the officers or body designated by law to issue the bonds upon such a contingency. This becomes very plain when we suppose the case of such a power granted to issue bonds, upon the existence of a state of facts to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds. In that case it would not be contended that a recital of the facts in the instrument itself, contrary to the finding of those charged by law with that duty, would have any legal effect.

"So, if the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be, that the authority to act at all depended upon

the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to proof of the fact, made a condition of its lawfulness, notwithstanding any recitals in the instrument."

In the present case we contend that it is the record made up in the proceeding before the County Judge which is to be resorted to in order to determine whether any authority existed for the appointment of the commissioners and for the issue of bonds by them, and if an examination of that record discloses the fact that the County Judge never acquired jurisdiction of the proceeding the defect cannot be aided or supplied by any recital in the bonds of facts which the commissioners have no authority to ascertain and determine.

It is also submitted that there is no recital in these bonds of any fact; that there is simply a reference to the law which, when complied with, authorizes the issue of bonds of this character. The proper construction of the second paragraph of the recital being that the acts referred to authorize the town of Andes to subscribe to the stock of the Delhi and Middletown Railroad Company, and to issue town bonds in payment thereof when the necessary and legal proceedings have been taken and had thereunder. It does nothing more than to especially direct the attention of the purchaser of the bonds to the acts under which bonds of this character may be issued. The purchaser is thus put upon his inquiry, and is bound to ascertain from the record of the proceeding whether the provisions of the law have been complied with.

TENTH.

The payment of interest does not estop the town from asserting the invalidity of the bonds, nor can it be construed to be a ratification of their issue. The defects in this case are jurisdictional, and for the same reasons above stated with reference to the effect of the recitals in the bonds, these jurisdictional defects cannot be cured by the involuntary payment of interest by means of forced tax levies. The passive submission of the tax-payers to the collection of moneys for this purpose and their application to the payment of interest cannot validate obligations which the town did not have authority to create. There are several decisions of the Federal courts to this effect.

In Thomas v. Town of Lansing, decided September 6, 1882 (14 Fed. Rep., 618), the bonds recited that they were issued under the provisions of the New York Bonding Act of 1866, and the several acts amendatory thereof and supplementary thereto, and purported to be attested by the hands and seals of three persons as duly appointed commissioners of the town, and the plaintiff was a *bona fide* holder, and interest had been paid and the stock certificate had been retained by the town, but the Court hold, at page 627, that the case falls within the principles adjudged in Marsh v. Fulton Co., 10 Wall., 676, because the power of the town to contract never existed. In such a case there can be no protection of the holder as an innocent purchaser, and no ratification of a power which never existed, by such alleged acts of ratification as are shown in this case. Citing East Oakland v. Skinner, 94 U. S., 255, 258; South Ottawa v. Perkins, *id.*, 260, 269; McClure v.

the statute, yet it was held in "Farnham v. Benedict," 107 N. Y., Court of Appeals, 159 (heretofore cited) that it was competent to prove that such affidavit was false, and in that case it was proved to be false in every particular, and such being the case no railroad corporation was in fact organized, and that the existence of such railroad lies at the foundation of the power to issue municipal bonds as has been heretofore suggested. The proof which was offered and rejected if received would have tended to show that no legitimate corporation ever existed. In the case last cited, referring to the bonding act of 1869, Judge Rapallo writing for the Court of Appeals says (see page 168) "it cannot be pretended that authority could be obtained under that act to issue town bonds to any incorporation, state or individuals who should undertake to style themselves a Railroad Company, nor that the mere filing of the articles of association in the office of the Secretary of State, without compliance with any of the other requirements of the general railroad law, would constitute those whose names were attached to such articles a corporation."

'Articles filed with an intentionally false affidavit would have no more actual validity than if the names of the subscribers had been forged.

TWELFTH.

The judgment entered at the Circuit should therefore be reversed, and judgment directed for the Plaintiff in error, dismissing the complaint of the plaintiff below with costs.

W. H. JOHNSON,
Counsel for Plaintiff in Error.

Office and Postoffice address,
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Sections one and two of Chapter 140, Laws of 1850, State of New York, as appears in N. Y. Rev. Stat. 6th Ed. Vol. 2d, commencing on page 519.

SECTION 1. Any number of persons, not less than twenty-five, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed, for the like public use; and for that purpose may make and sign articles of association, in which shall be stated the name of the company; the number of years the same is to continue, the places from and to which the road is to be constructed, or maintained and operated; the length of such road as near as may be, and the name of each county in this state through or into which it is made, or intended to be made; the amount of the capital stock of the company, which shall not be less than ten thousand dollars for every mile of road constructed, or proposed to be constructed, and the number of shares of which said capital stock shall consist, and the names and places of residence of thirteen directors of the company, who shall manage its affairs for the first year, and until others are chosen in their places. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company. On compliance with the provisions of the next section such articles of association may be filed in the office of the secretary of state, who shall endorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose; and thereupon the persons who have so subscribed such articles of associ-

ation, and all persons who shall become stockholders in such company, shall be a corporation by the name specified in such articles of association and shall possess the powers and privileges granted to corporations, and be subject to the provisions contained in title three of chapter eighteen of the first part of the revised statutes except the provisions contained in the seventh section of said title.

SECTION 2. Such articles of association shall not be filed and recorded in the office of the secretary of state, until at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto, and ten per cent paid thereon in good faith, and in cash, to the directors named in said articles of association; nor until there is indorsed thereon or annexed thereto an affidavit made by at least three of the directors named in said articles, that the amount of stock required by this section has been in good faith subscribed, and ten per cent paid in cash thereon as aforesaid, and that it is intended in good faith to construct or to maintain and operate the road mentioned in such articles of association; which affidavit shall be recorded with the articles of association as aforesaid.

SECTION 3. A copy of any articles of association filed and recorded in pursuance with this act, or of the record thereof, with a copy of the affidavit aforesaid indorsed thereon or annexed thereto, and certified to be a copy by the secretary of this state, or his deputy, shall be presumptive evidence of the incorporation of such company, and of the facts therein stated.

Chapter 907 of Session Laws of 1869 of the State of New York.

AN ACT to amend an act entitled an act to authorize

the formation of railroad corporations and to regulate the same, passed April 2d, 1850, so as to permit municipal corporations to aid in the construction of railroads. Passed May 18th, 1869; three-fifths being present.

The people of the State of New York represented in Senate and Assembly do enact as follows:

SECTION 1. Whenever a majority of the taxpayers of any municipal corporation in this state whose names appear upon the last preceding tax list or assessment roll of said corporation as owning or representing a majority of the taxable property in the corporate limits of such corporation, shall make application to the County Judge of the county in which such corporation is situated, by petition verified by one of the petitioners setting forth that they are such a majority of taxpayers and represent such a majority of taxable property, and that they desire that such municipal corporations shall create and issue its bonds to an amount named in such petition (but not to exceed twenty per cent of the whole amount of taxable property as shown by said tax list and assessment roll), and invest the same or the proceeds thereof in the stock or bonds (as said petition may direct) of such railroad company in this state as may be named in said petition, it shall be the duty of said County Judge to order that a notice shall be forthwith published in some newspaper in such county, or if there be no newspaper published in said county, then in some newspaper printed in an adjoining county, directed to whom it may concern, setting forth that, on a day therein named, which shall not be less than ten days nor more than thirty days from the day of such publication, he will proceed to take proof of the facts set forth in said petition as to the number of taxpayers join-

ing in such petition, and as to the amount of taxable property represented by them. And any solvent, moneyed, manufacturing or other corporation or company formed under the laws of this state, and being assessed on real or personal property therein, shall have all the rights and privileges under this act so far as property representation is concerned, as other taxpayers. And the board of directors or trustees of any such corporation or company may apply to the County Judge by petition in the same manner as herein provided for other taxpayers. The words "municipal corporation" when used in this act, shall be construed to mean any city, town or incorporated village in this state. But nothing herein contained shall be construed as to include the city or counties of New York, Kings, Erie, Greene, Albany, Westchester, Ontario, Seneca, Yates, Onondaga and Niagara.

SECTION 2. It shall be the duty of the said Judge at the time and place named in the said notice to proceed to take proof as to the said allegations in said petition; and if it shall appear satisfactorily to him that the said petitioners, or the said petitioners and such other taxpayers of said town as may then and there appear before him and express a desire to join as petitioners in said petition, do represent a majority of the taxpayers of said municipal corporation as shown by the last preceding tax list or assessment roll, and do represent a majority of the taxable property upon said list or roll, he shall so adjudge and determine and cause the same to be entered of record. And such judgment and the record thereof shall have the same force and effect as other judgments and records in courts of record in this state.

SECTION 3. If the said Judge shall adjudge and determine that such petitioners do represent a majority of such taxpayers as aforesaid, and a majority of such taxable property, as aforesaid, it shall be his duty forthwith to appoint and commission three persons who shall be freeholders, residents and taxpayers within the corporate limits of such corporation, to be commissioners for the purposes hereinafter named. The said commissioners shall hold their offices for five years and until others are appointed by the County Judge of said county, and shall, before entering upon the duties of their office, each make oath faithfully to discharge all the duties thereof. All vacancies in such commission shall also be filled by said County Judge as they occur. Said commissioners shall each receive the sum of three dollars per day for each day actually engaged in the discharge of their duties, and their necessary disbursements to be audited and paid by the usual disbursing officer of such municipal corporation. A majority of such commissioners, at a meeting of which all have notice, shall constitute a quorum and may exercise the powers of the commission.

SECTION 4. It shall be the duty of such commissioner, with all reasonable dispatch, to cause to be made and executed the bonds of such municipal corporation, attested by the seal of such corporation affixed thereto, if such corporation has a common seal, and if not, then by their individual seals, and signed and certified by said commissioners, who are hereby authorized and empowered to affix such common seal thereto and to sign and certify such bonds. Such bonds shall become due and payable at the expiration of thirty years from their date, and shall bear interest at the rate of seven per

cent per annum, payable semi-annually, and shall not exceed in amount twenty per cent of the entire taxable property within the bounds of said municipal corporation as shown by said tax list, nor shall they exceed in amount the amount set forth in such petition. The said bonds shall also bear interest warrants corresponding in number and amounts with the several payments of interest to become due thereon, but the commissioners may agree with any holders to register any such bonds, in which case the interest warrants on the registered bonds shall be surrendered, and the interest shall be payable only on the production of the registered bond, which shall then be transferrable only on the commissioners' records. The savings banks of this state are authorized to invest in said bonds, not to exceed ten per cent of their deposits. All taxes except school and road taxes, collected for the next thirty years, or so much thereof as may be necessary, in any town, village or city, on the assessed valuation of any railroad in said town, village or city, for which said town, village or city has issued or shall issue bonds to aid in the construction of said railroad, shall be paid over to the Treasurer of the county in which said town, village or city lies, and said money so paid over, including interest collected on bonds held by said Treasurer as a sinking fund, shall be invested by said Treasurer in state, city, town, county or village bonds, issued pursuant to law of this state on United States bonds, within sixty days after receiving the same, and shall be held by said County Treasurer as a sinking fund for the redemption and payment of the bonds issued or to be issued by said town, village or city, to aid in the construction of said railroad.

SECTION 5. Such commissioners are further empowered and directed to subscribe in the name of the municipal corporation which they represent to the stock or bonds of the railroad company named in such petition (as the petition may direct), to an amount equal to the amount of bonds so created by them, and to pay for the same by exchanging the said bonds therefor at par; or they may, at their discretion sell and dispose of the said municipal corporation bonds so created by them at rates not less than par, and invest the proceeds thereof in such stock or bonds of such railroad company as may be directed in said petition. They shall represent, either in person or by proxy, such municipal corporation at all meetings of such railroad bond holders or stockholders. Such stock or bonds so purchased by said commissioners may be sold by them before the maturing of the bonds of such municipal corporation only upon the order of the County Judge of the county, made upon the petition of a majority of the taxpayers of said municipal corporation representing a majority of the taxable property thereof, as shown by the last preceding tax list or assessment roll; and the proceeds from such sale shall be forthwith paid by them to the Treasurer (or other proper officer) of such municipal corporation, to be by him invested in a sinking fund, as hereinafter provided. Such commissioners may vote for directors on the stock of such town, village or city.

SECTION 6. The bonds of any municipal corporation, issued pursuant to the provision of this act, shall be a charge upon the real and personal estate within the limits thereof, and the principal and interest thereof when due (or so much as thereof as shall fail to be met by the interest on such railroad bonds or the dividends

on such railroad stock, or the sinking fund herein provided for) shall be collected and paid in like manner as other debts, obligations and charges against the said municipal corporation. The said commissioner shall also provide within three years from the time of issuing said bonds, for the annual payment of at least one per cent of the same, to constitute a sinking fund, so as to secure the final liquidation of said bonds within twenty-five years after their date, and for that purpose they shall receive and apply annually the surplus dividend on the stock held by said town over the amount necessary to pay the annual interest on said bonds, and if the amount of such surplus dividends is not sufficient for the annual payments of said one per cent, and the said commissioner shall not have received sufficient from the sale of stock belonging to the town to pay the same, and from other sources as herein provided, then deficiency shall be reported by said commissioners to the Board of Supervisors, to be levied and raised annually in the manner herein provided for paying the interest on said bonds. The Treasurer (or other proper officer of such municipal corporation) shall have the custody of any railroad bonds or certificates of stock that may be subscribed for as aforesaid, and shall collect the interest upon any such bonds or the dividends upon such stock as it becomes due or is made payable, and shall apply the same towards the payment of the interest from time to time becoming due upon the said bonds of said municipal corporation; any surplus of interest or dividends, after providing for the interest upon the bonds of said municipal corporation, shall go to make up a sinking fund for the redemption of the principal of said corporation bonds. In case the stock or bonds

purchased as aforesaid are sold by said commissioners, such treasurer or that officer shall also invest the proceeds thereof in a like sinking fund; and in case the same are not sold when the said bonds hereby authorized to be created and issued by said commissioners shall mature and the principal thereof become payable, the commissioner shall sell the same or so much thereof as shall be necessary to pay the outstanding principal sum due on such bonds in full, and shall pay the proceeds thereof to such treasurer or other proper officer, to be by him applied to the redemption and payment of such bonds.

SECTION 7. The moneys received by any railroad company from any such commissioners, or from the sale of any bonds of any municipal corporation which they may receive under the provisions of this act, shall be by the said company faithfully applied to the construction and equipment of such railroad, and to no other purpose; and any other use thereof by any officer or agent of such company shall be deemed to be a misdemeanor, and shall be punished on conviction by imprisonment in the county jail for a term not exceeding five years.

SECTION 8. The bonds of any municipal corporation which may be issued under the provisions of this act shall be registered in the office of the County Clerk of the county in which such corporation is situated, and shall have the words "registered in the county clerk's office" written or printed upon them, attested by the official seal of said clerk; and said clerk shall receive for each such attestation the sum of twenty cents.

SECTION 9. Whenever any municipal corporation in this state that has heretofore issued its bonds in aid

of any railroad, upon the written consent of taxpayers, or whenever any holder of such bonds so heretofore issued shall desire to perpetuate the proof of such consent in the manner hereinbefore provided for the perpetuation of the proof of such consent, as to bonds which may be issued under the provision of this act, application for the purpose may be made the County Judge of the county in which such municipal corporation is situated; and it shall be lawful for such Judge, after notice to whom it may concern in manner as hereinbefore provided, to proceed to take proof concerning the allegation in such petition; and if it shall be proved to his satisfaction that all the consents necessary to be obtained before such bonds could be lawfully issued were so obtained, he shall find the facts and so adjudge and determine; and such judgment, and the record thereof, shall have the same force and effect as other judgments and records in other courts of record in this state.

SECTION 10. Nothing herein contained shall be construed as permitting any municipal corporation, in or through which a railroad has already been constructed and is in operation, to aid in the construction of any road or competing railroad, under the provisions of this act, unless the railroad already built appears by its corporate name upon the assessment roll specified in this act.

SECTION 11. This act shall take effect immediately.

158-312

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UNITED STATES SUPREME COURT.

THE TOWN OF ANDES,
Plaintiff in Error,

AGAINST

DUDLEY P. ELY,
Defendant in Error.

No. 295.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Facts.

Dudley P. Ely, a citizen of Connecticut, brought this action in the United States Circuit Court for the Northern District of New York against the Town of Andes, one of the towns of the County of Delaware, in the State of New York, upon coupons cut from its town bonds. Upon December 31, 1890, he recovered a judgment against the Town of Andes for $32,676.71. Upon April 25, 1891, the Town of Andes obtained a writ of error to this Court.

The Delhi and Middleton Railroad Company is a railroad corporation of the State of New York, incorporated November 14, 1870 (fol. 32).

Upon March 2, 1871, the Board of Directors located the road by "Tremperskill and Fish Lake," making the location by Lumberville and Shavertown and Andes Village and Fish Lake (fol. 50). Upon March 4, 1874,

a map and profile of this route was filed in the Clerk's Office of Delaware County, as required by law (fols. 35, 36, 50). The location by these places was never changed, but in 1872 an amended map of eight miles of the route between Lumberville and Shavertown was filed, making the distance somewhat shorter.

After the road had been actually located, and upon May 6, 1871, nineteen petitions were presented to the County Judge of Delaware County asking that the Town of Andes might be bonded in the sum of $98,000 in aid of said road. Each petition was separate, and the one numbered 7, to which a large number of signatures were attached, was in the form prescribed by the General Bonding Act, Chapter 907 of 1869, and attached thereto was a verification by one of the subscribers to petition No. 7 (fols. 36-38). None of the other petitions had a verification attached. Each had the same printed heading as No. 7, but petition No. 1 had, at the end of the printed heading, "On condition that said road is located by Fish Lake and Shavertown." Petition No. 4 had interlined, "On condition that said road is located by Fish Lake and Shavertown or village." Petition No. 14 had interlined at the end of the heading and before the signatures, "Above conditions shall be null and void unless said road shall be located by Shavertown and Lumberville." Upon presentation of the petitions, the County Judge made the usual order for a hearing to be had before him upon May 22, 1871, at his office, and this notice was regularly published (fols. 39, 40). The office of the County Judge referred to in the notice was his public office at the Court House in Delhi (fol. 50). Upon May 22, 1871, a hearing was had. Thereafter the County Judge made an adjudication in the form required by law, showing the requisite majority consent (fol. 41). By a separate order the County Judge appointed three commissioners (fol. 42). The papers were all filed in the Clerk's Office; the adjudication was entered of record in full May 22, 1871 (fol.

38). Thereafter, the commissioners issued $98,000 of bonds, all dated September 1, 1871, payable September 1, 1901, and the same were registered November 30, 1871, in the Delaware County Clerk's Office, and were thereupon delivered to the railroad company in exchange for $98,000 of its capital stock. In 1872 the railroad company sold all the bonds to *bona fide* purchasers at prices at or near par (fols. 55, 57, 58). For ten years thereafter the interest was regularly paid by the town semi-annually, and the bonds were bought and sold as securities of the highest value, and, at the commencement of the year 1882, were mainly lodged in the hands of savings banks and of estates, who had purchased them at par or at a premium (fols. 63-68). In 1874 the Legislature of the State of New York enacted a law, Chap. 453, entitled "An Act authorizing the voters of the Town of Andes to decide by ballot whether they will authorize the Railroad Commissioners of said town to sell and convey the town stock owned by said town in the Delhi and Middletown Railroad." A town meeting was held, and the voters decided not to sell the stock (fol. 60). In 1875 the Legislature of the State of New York passed an act, Chap. 153, entitled "An Act relating to stock of the Delhi and Middletown Railroad Company owned by the Town of Andes, Delaware County." This act declared "it shall be lawful for the voters of the Town of Andes, Delaware County, at a special town meeting, to be called and held in accordance with law, to vote upon the question of selling the stock in the Delhi and Middletown Railroad Company belonging to said town and held by commissioners of the said town." The act then provided for an election, and declared that the record of the result of such election should be filed in the office of the County Clerk of Delaware County, and "if a majority of the ballots received thereat should contain the words 'in favor of selling Delhi and Middletown Railroad stock,' then it shall be lawful for the commissioners of said town having said stock in charge to sell the

same, and to execute all papers necessary to convey a perfect title to the same." At a meeting held under this act 335 votes were cast in favor of selling the stock and two against it (fol. 61).

In 1878, in pursuance of a resolution of a town meeting, $3,000 of the principal of the bonds were paid. The railroad company expended $200,000 in constructing its road, but became embarrassed and was foreclosed. Thereupon, and in 1882, the town determined to repudiate these bonds. In that year Malcolm Calhoun and others, taxpayers of the Town of Andes, under the direction of the Town of Andes, brought an action in the Supreme Court of the State of New York for the cancellation of the bonds. That action was pending at the time that the present action was commenced and is referred to in the third defense of the answer. While that action was pending the Town of Andes instigated a collusive suit under the title of David Craig against the Town of Andes, and took the same to the Court of Appeals. Upon the facts as presented in that case the Court of Appeals held, by a vote of four to three, that the bonds were void. The ground of this decision was that the petition was conditional (Craig vs. The Town of Andes, 93 N. Y., 405). Subsequently the action in equity was brought to trial, and, upon the trial, the collusive nature of the Craig action was shown. Thereupon the Court decided the action in favor of the bondholders. Upon appeal the decision was affirmed at the General Term, and the bonds were declared to be valid. The case was then appealed in behalf of the town to the Court of Appeals, and is reported under the title of Calhoun vs Millard, 121 N. Y., 69. The Court of Appeals decided the case in favor of the bondholders, and said: "The question of "the validity of the bonds of the Town of Andes, is- "sued under the Act of 1869, was presented to and "adjudicated by this Court in the case of Craig vs. "Town of Andes (93 N. Y., 405). It was there de-

" cided, for reasons disclosed in the prevailing opinion,
" that the bonds were void."

" That action was brought after the commencement
" of the present one, to recover interest on certain of
" the bonds, which fell due March 1, 1882. It now
" appears from the evidence in this action that the
" Craig suit was brought at the instance of Ballantine,
" the supervisor of the town, and the trial judge found
" 'that the coupons on which the action was brought
" were paid for out of the moneys of said town, and
" said action was prosecuted by attorneys paid by said
" town, said town paying all the expenses thereof, and
" the suit was brought and defended for the purpose of
" procuring the bonds of said town to be declared in-
" valid.'

" We fully assent to the claim of the counsel for the
" bondholders, that an adjudication obtained under
" such circumstances ought not to stand in the way of
" a re-examination, by the Court, of the grounds upon
" which it proceeded, and if we were now satisfied
" either that upon the facts presented in that case the
" question of law was erroneously decided, or that facts
" not disclosed on the trial of the Craig case, but now
" brought out, would, if then disclosed, have led to a
" different result, the circumstances stated would em-
" phasize the duty of the court to correct its error, or
" to conform the judgment in the present case to the
" new circumstances.

" It is claimed that material facts bearing upon the
" validity of the bonds, not shown on the trial of the
" Craig case, were proved on the trial of the present
" one, prominent among which is the fact, which now
" appears, that the railroad in aid of which the bonds
" were issued had been in fact legally located on the
" identical route specified in the conditional consents
" prior to May 6, 1871, the date of the presentation of
" the petition and consents to the county judge. But
" we deem it unnecessary to determine whether the
" new facts presented affect the principle of our

" former decision, for the reason that we think the " judgment below dismissing the complaint in this " action was properly rendered, assuming the invalidity " of the bonds " (121 N. Y., 75).

" The town and the taxpayers permitted the bonds " to be dealt with and taken by savings banks and " others for nearly ten years, not only without, so far as " appears, a word of warning or protest, but by affirma- " tive acts of recognition, encouraged investment therein " as safe and valid securities. The bonds, resting on " the adjudicat on of the County Judge, were apparently " valid. The Legislature has still the power to ratify " them and make them valid obligations of the town " (Williams vs. Town of Duanesburgh, 66 N. Y., 129; " Horton vs. Town of Thompson, 71 *Id.*, 513; Rogers " vs. Stephens, 86 *Id.*, 623). They are now in the " hands of *bona fide* holders; that is, of persons who " have paid value for them without notice. The fact " that if the plaintiffs are defeated here, the bonds may " be sued upon and enforced in another jurisdiction, " constitutes no equitable reason for maintaining the " action (Town of Venice vs. Woodruff, *supra*)."

" The denial of relief in this case may result practi- " cally in the enforcement of the bonds in question, " and also of other town bonds issued and held under " similar circumstances. But in contrasting the relative " conduct and situation of the town and the taxpayers " on the one side, and the purchasers of bonds on the " other, we cannot say that such a result will be " repugnant to any principle of justice or equity " (121 N. Y., 83).

Thus, it will be seen that the validity of these bonds is recognized by the Court of Appeals of the State of New York to be an open question in that Court.

Point I.

An examination of the decisions of the Courts of the State of New York will show that these bonds are valid according to the laws of that State. Under the decisions above referred to the validity of the bonds under the facts proved in this case is clear. In the dissenting opinion of Judge FINCH in Craig vs. The Town of Andes, 93 N. Y., page 419, the question was concisely stated as follows: "The Town of Andes disputes the "validity of its bonds after having steadily paid the "interest upon them for a period of about ten years, "after having also paid a part of the principal, "and when innocent persons deceived by the appear- "ance of validity have largely become their owners. "The adjudication of the County Judge before whom "all parties were summoned and given an opportunity "to be heard has remained unchallenged during all this "period of time, but has now been discovered to have "been without jurisdiction. *The ground of this conclu-* "*sion is a single one out of many alleged*, and to that "one alone it now becomes necessary to direct atten- "tion. Briefly, though I trust fairly, stated it is this: "That, under the Statute of 1869, a petition 'absolute "'in form' was requisite to the jurisdiction, and that "the one presented was not 'absolute in form' because "one-quarter of the signers added to their consents "conditions that the railroad be located by a particu- lar route." Judge FINCH then proceeded to answer the argument of Judge DANFORTH, and the attention of the Court is directed to his opinion. "The argument in "favor of jurisdiction is there stated with rare cogency, "and nothing need be added to the clear and per- "spicuous reasoning of that learned Judge" (per COXE, J., in opinion in Slauson vs. Town of Andes,).

Among the grounds stated by Judge FINCH for upholding the jurisdiction was one to the effect that Chap. 507 of the Laws of 1870 authorized a conditional

petition, and the opinion of the Supreme Court of the State of New York in the case of the People vs. Peck, 4 Lansing, 528, was cited by Judge FINCH and approved. In that case the Court held that a conditional petition was valid under the Act of 1870, and the Supreme Court said: "For by that act it was provided "that the railroad company might enter into an agree- "ment with the Commissioners, which, among other "things, should limit and define the place or places "where and the purposes for which the bonds or their "proceeds should be used. The power to make such "an agreement was manifestly conferred for the benefit "of the taxpayers themselves, and they had the right, "therefore, to insist upon it that it should be observed "and made use of according to their direction by "the Commissioners who might be appointed in "the proceedings, and the most practical mode of "giving that direction was by its insertion in the "petition so that it might become the basis "of the authority of the Commissioners and operate as "a restriction on that authority." Now, the answer of Judge DANFORTH to this argument is as follows: "It, "the act, gives no power to locate a road, but the right "to designate upon what portion of a road already lo- "cated the bounty of the town shall be applied." It did not appear in the Craig case that the road had been "already located," and, upon the assumption that the road had not been located, Judge DANFORTH treated the conditional consents as an attempt to locate the road. The actual location of the road, however, brings the case directly within the Act of 1870 and the argument of the Court in the case of People vs. Peck, *supra*, and, if this fact had appeared in the Craig case, it would not have been possible for the Court to have condemned the petition. And so, in Calhoun vs. Millard, 121 N. Y., at page 76, Judge ANDREWS, who was one of the Judges who voted against the validity of the bonds in the Craig case, refers to the proof of actual location

of the railroad as a prominent fact distinguishing the two cases.

The importance of this proof of actual location of the railroad is further apparent by a reference to the opinion of Judge FINCH, 93 N. Y., 425: "A condition "already performed in no manner qualifies the con- "sents. In such event, the consent is absolute the "moment it is given. * * * It is not at all "doubtful if, when the petition was presented, the "railroad company had already actually located their "line in accordance with the alleged conditions, "* * * the entire consents could all be counted as "absolute, unqualified and dependent upon nothing in "the future for their efficacy." There is nothing in the majority opinion in conflict with this doctrine, but that opinion goes upon the ground that the condition was actually existing. It does not hold that it was necessary to circulate the petition over again merely because a description of the road as actually located was inserted in the form of a condition.

Point II.

The statutory authority to issue these bonds was ample and valid. This authority is found in Chapter 907 of the Laws of New York for 1869, known as the General Railroad Bonding Act of New York, and is upheld by numerous decisions of this Court.

The Town of Andes is situated in Delaware County, one of the counties included in the act, and the Delhi and Middletown Railroad Company is a corporation of the State of New York; the act therefore conferred upon this town the capacity to issue its bonds in aid of this railroad. As is universally the case, the consent of the taxables was required, and, in order that this

consent might be conclusively determined, the County Judge of Delaware County was constituted a tribunal to hear and determine this question, and provision was made in the act for the review of his decision by *certiorari*, if desired. Section 2 of the act declares that "the judgment of the County Judge and the record thereof shall have the same force and effect as other judgments and records in courts of record in this State."

Point III.

The questions involved in this case regarding the validity of the bonds are *res adjudicata* in this Court, not merely as controlled by the general doctrine of the Court in such cases, but by the direct adjudication of this Court in the case of Munson vs. Town of Lyons, 12 Blatchford, 539; affirmed 99 U. S. Supreme Court, 684. In order to show the exact similarity of these cases, reference is made to the opinion of Judge WALLACE in the Circuit Court, 12 Blatchford, 541:

"Upon February 6, 1871, the petition was presented "to the County Judge of Wayne County, containing "[the usual statements in such petitions, and also con- "taining the conditions], 'provided that the ter- "minous of said road be made at Nicholas Point in the "Town of Huron.' It is understood that the stock so "to be taken is to embrace and include the stock now "already subscribed and taken by persons re- "siding in said Town of Lyons, amounting "to the sum of $16,400. The County Judge "caused notice to be given and proceeded to take proofs, "and, during the progress of taking the proofs, and on "May 12, 1871, the Legislature passed an act, chapter "925 of 1871, by which certain sections of that act were "changed in important particulars, while in other sec-

" tions no changes were made. None of the sections " of the prior act were repealed in terms, but the sec- " tions referred to were modified by the words 'are " amended to read as follows:'—All proceedings, after " the amendatory act was passed, were conducted pur- " suant to the requirements of that act, and, on May " 17, 1872, the County Judge adjudged that the allega- " tions of the petitions were proven and appointed " Commissioners. The act of 1871 required that the " petition should be filed by the County Judge as a " part of the judgment roll, and that his judgment be " entered of record in the Clerk's office of his county. " It also made provision for the review of the proceed- " ings by *certiorari*, by which the appellate courts were " authorized, 'in appeals now pending, and in all future " proceedings to reverse or reform or modify the de- " termination or to remand the whole matter back to " the county judge to be heard and determined by " him."

The validity of the bonds of the Town of Lyons was maintained by the Circuit Court, and upon appeal this Court said, 99 U. S., 684: " Propositions covering the " entire ground of the controversy between the parties " have been so frequently decided by this Court that " any extended examination of the case is unnecessary. " The Town of Orleans vs. Platt, 99 U. S., 676, our " last adjudication of this class is conclusive in favor of " affirming the judgment of the Circuit Court. The " County Judge, unquestionably, had jurisdiction to de- " cide upon the application made by the taxpayers. " His judgment, until reversed, was final. If there " were errors, the proceeding should have been brought " before a higher court for review by writ of *certiorari*. " The judgment rendered can no more be collaterally " attacked in this case than could any other judgment " of a court of competent jurisdiction. * * * The " recital in the bonds set forth the judgment of the " County Judge that it was duly rendered. * * * " Under such circumstances the recital is an estoppel.

" To imply the intent that such obligations, after they " are negotiated shall be vulnerable to the objections " here urged, would be to impute bad faith to the " authors of such legislation toward those who are to " be induced to invest in such bonds."

Now, in the case at bar, it appears that upon May 10, 1871, nineteen petitions were presented to the County Judge of Delaware County, of which sixteen were, in all respects, conformable to the most rigid criticism which can be made with reference to the form of a petition, and one of them, No. 7, was duly verified. The other three petitions contained interlineations, all, in substance, the same, namely, " on condition that the road shall be located by Shavertown, Andes and Fish Lake." It is proven in this case that, as a matter of fact, the road had actually been located upon the route designated in these three petitions before the petitions were presented to the County Judge (fols. 155, 181, and map, fol. 191). Assuming, however, for the purposes of the present argument, a position most favorable to the appellant, namely, that these three petitions were a part of the original petition and qualify the whole of it with an actual subsisting condition, then there is presented the first question which was presented in the Town of Lyons case, and which was so emphatically disposed of in the decisions just cited. The Act of 1871 was passed upon May 12th, after the County Judge of Delaware County had assumed jurisdiction and had made the order for publication required by both acts. The only essential change made by the Act of 1871 was made in Section 1 of the act, by inserting a requirement that the majority of the taxpayers should be exclusive of those taxed for dogs or highway tax only, and by defining the term taxpayers as persons assessed for property, and not for dogs or highway tax only. Under this section it was held by Judge Blatchford in the United States Circuit Court, that a petition in the form required by the Act of 1869 was sufficient to confer jurisdiction upon the County Judge

although presented after May 12, 1871. It is unnecessary, however, to discuss that proposition here, as this petition, when presented, conformed to all the requirements of the Act of 1869, and, therefore, gave the County Judge jurisdiction; and the Act of 1871, instead of manifesting an intention of affecting or arresting pending proceedings, provided for their continuance by prescribing in its fourth section the mode of proceeding in matters then pending, and that hereafter persons taxed for dogs or highway tax should not be counted. The same identical question arose in the Town of Lyons case, and was fully considered and answered by Judge WALLACE in his opinion. It may be noticed that the Courts of the State of New York have also decided that proceedings under the Act of 1869 were not impaired by the passage of the Act of 1871.

Calhoun vs. Delhi & Middletown Railroad, 28 Hun, 379.

Point IV.

No case can be cited where the statutory authority conferred upon a municipality to issue bonds, has not been coupled with conditions. Of course, if there is no capacity conferred upon the municipality to issue its bonds in any event, there can be no liability nor any estoppel; but where the statutory authority has been conferred upon the performance of certain conditions, then it is the settled doctrine of this Court that an estoppel may be created, and it is quite unnecessary to suggest that this Court, in so deciding, has overruled, after full consideration, the decisions of many State Courts.

It is settled in this Court that such an estoppel will arise.

1. If the statute provides a tribunal to ascertain whether the antecedent conditions have been complied with, and that tribunal has so decided.

Knox vs. Aspinwall, 21 Howard, 539.
Town of Venice vs. Murdock, 92 U. S., 494.

2. If the bonds made by the *de facto* Commissioners contain a recital of the existence of the power.

3. If the town has received and retained the stock of the railroad.

Pendleton County vs. Amy, 13 Wall., 297.

4. If the municipality has paid, for a time, interest upon the bonds.

All these grounds of estoppel exist in the present case.

I. In Orleans vs. Pratt, 99 U. S., 676, this Court says, construing this very statute:

"The County Judge was the officer charged by law to decide whether the bonds could be legally issued, and his judgment was conclusive until reversed by a higher court."

See, also,

Lynde vs. The County, 16 Wall., 6.
Township of Rock Creek vs. Strong, 96 U. S., 271.
Pana vs. Bowler, 107 U. S., 529.

II. These bonds upon their face recite the circumstances which bring them within the power. They specify the proper acts and recite that they are issued thereunder, and that all necessary and legal proceedings have been taken and had under said acts. In connection with this point, it may be further noticed that the Legislature of the State of New York has expressly recognized the Commissioners of the Town of Andes as legal Commissioners, and has also recognized

the title of the town to the stock received by the town in exchange for its bonds.

Chapter 453, Laws of 1874.
City of Cairo vs. Zane, 149 U. S., p. 122.
Brooklyn vs. Ætna L. Ins. Co., 99 U. S., p. 362.
Am. L. Ins. Co. vs. Bruce, 105 U. S., 328.
German Savings Bank vs. Franklin Co., 128 U. S., 526.
Walnut vs. Wade, 103 U. S., 683.
Clay Co. vs. Society for Savings, 104 U. S., 586.
Warren Co. vs. Marcy, 97 U. S., 96.
Johnson Co. Commrs. vs. January, 94 U. S., 202.
Douglas Co. Commrs. vs. Bolles, 94 U. S., 104, 108.
Lynde vs. Winnebago Co., 83 U. S., 6.
Marshall Co. Supervisors vs. Schenck, 72 U. S., 772.
Olcott vs. Fondulac Co. Suprs., 83 U. S., 678.
Lexington vs. Butler, 81 U. S., 283.
Meyer vs. Muscatine, 68 U. S., 385.
Knox Co. Commrs. vs. Aspinwall, 62 U. S., 544.
St. Joseph Township vs. Rogers, 83 U. S., 644.
Pine Grove Township vs. Talcott, 86 U. S., 666.
Kimball vs. Town of Lakeland, 41 F., 289.

In Orleans vs. Platt, 99 U. S., p. 682, the Court said:

"This Court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such securities, and does so, the *bona fide* holder has a right to presume the power was properly exercised and is not bound to look beyond the question of its existence. When the bonds on their face recite the circumstances which bring them within the power the corporation is estopped to deny the truth of the recital."

That action was brought upon bonds of the Town of

Orleans in the State of New York, issued under the identical statute in question here.

The cases of The Town of Orleans against Platt, 99 U. S., p. 682, and of The Town of Lyons vs. Munson, 99 U. S., p. 684, have been since 1878 the controlling cases in the Circuit Courts of the State of New York upon the construction of the New York Bonding Acts of 1869 and 1871, and the validity of many millions of dollars of securities has been upheld upon the construction there given to those acts. The cardinal feature of those acts was the creation of a tribunal to decide whether the bonds could be legally issued. It is impossible to distinguish the present case from the case of The Town of Lyons vs. Munson, and it is impossible to overrule that case without overruling the general principle upon which bonds have been uniformly upheld in this Court as against the decisions of many State Courts to the effect that even if a tribunal was created its decision does not really decide anything, and may be attacked in a collateral proceeding.

The statute declares that the judgment "*shall have the same force and effect as other judgments and records in courts of record in this State.*"

By this provision, Section 721 of the Code of Civil Procedure, defining the force and effect of judgments of courts of record, was incorporated into the act, and the public were informed that the judgment would not be impaired or affected for want of a summons or other writ, or for any fault or defect in process, or for mispleading, insufficient pleading or *jeofail*, or for omitting to allege any matter without proof of which the decision ought not to have been rendered, and all the presumptions in favor of the jurisdiction of courts of record were conferred upon the judgment of the County Judge.

In *Calhoun vs. The Delhi and Middletown R. R. Co. et al.*, 28 Hun, p. 387, the Court at General Term held that the judgment could not be attacked collaterally. The Court said: "It would be remarkable if a judgment,

unchallenged for eleven years, and declared by the act under which it was rendered to 'have the same force and effect as other judgments and records in courts of record in this State,' should be adjudged void for a want of a literal and exact compliance with a statute, in the form of the petition presented, when the right to render the judgment sought did not depend upon such petition alone, but upon the fact that a majority of taxpayers representing a majority of the property of the town desired the issue of the bonds. It seems to us clear, then, that none of technical objections which have been made either to the form of the petition presented to the County Judge or to the notice of hearing are available in the collateral suit. The whole policy of the act forbids their consideration. This is apparent, as has already been stated, not only from the effect which it declares shall be given to the judgment, "but also from the definite provisions made for its "review, the careful enunciation of the powers of the "appellate court therein, extending not only to its re-"versal, affirmance or modification in whole or in part, "but to the sending back of the proceeding for further "ruling upon any one point, and the lodgment in the "General Term alone of the power to grant an injunc-"tion to restrain the issue of the bonds in conformity "with such judgment. The equity of this position is "obvious. Under the apparent sanction, at least, of "legislative authority, and the solemn and formal judg-"ments of judicial officers, what purport to be valid ob-"ligations of towns have been issued to the extent of "millions of dollars. These obligations have passed "into the hands of innocent purchasers, oftentimes, as "in this case, into the hands of institutions which are "the depositories of the savings of the poor. If, there-"fore, any other rule than the one stated should be "adopted, parties can shift from themselves to others "the burdens they ought to bear, for the reason that "they had either voluntarily assumed them, or had

" been so careless as not to prevent their creation by " the use of means placed at their disposal."

The case just cited involved the validity of the bonds of the Town of Andes, and the Court in an elaborate opinion held further that all of the objections on the part of the town were unfounded, upon any construction of the statute.

We say, therefore, in the first place, that the judgment was conclusive upon the validity of the bonds, and, in the second place, the certificate and recital of the Commissioners was also conclusive under the decisions of this Court.

By the fourth section of the Bonding Act of 1869 (1 R. S., p. 310, Birdseye's edition), the Commissioners were directed "to sign *and certify* such bonds." Assuming that the judgment is conclusive it may be suggested that the certificate of the Commissioners did not make the bonds any better; but, if it could be assumed that the judgment only created a presumption of validity, then it was the duty of the Commissioners, before making their certificate, to determine that the condition precedent had been complied with and their certificate to that effect was within the line of their authority. Therefore this Court did not err in deciding in the Orleans and Lyons cases, *supra*, that the recitals were conclusive, and the fact that the Commissioners were directed to certify these bonds distinguishes this case from the cases where this Court has held that the certificate of the Commissioners must be in the line of their authority.

" The meaning of the law granting power to issue bonds is that they may be issued, not upon the existence of certain facts to be ascertained and determined whenever disputed, but upon the ascertainment and determination of their existence by the officers or body designated by law to issue the bonds upon such a contingency."

Dixon County vs. Field, 111 U. S., p. 83.

III. In Pendleton County vs. Amy, 13 Wallace, 297, this Court said:

"Having exchanged the bonds for the stock, we think the county cannot retain the proceeds of the exchange, and assert against the purchaser for value that, although the Legislature empowered it to make them on certain conditions, they were issued in disregard of the conditions."

In the present case the town exchanged the bonds for $98,000 of stock, and an agreement that the proceeds of the bonds should be expended in the Town of Andes. About $100,000 were actually expended in the Town of Andes (fol. 52). In 1874 the town took affirmative action with reference to this stock, and procured the passage of an Act of the Legislature (L. 1874, Chap. 453). This act was entitled "An Act authorizing the Town Clerk of the Town of Andes in Delaware County to call a special town meeting, and authorizing the voters of said town to decide by ballot whether they will authorize the Railroad Commissioners of said town to sell and convey the town stock owned by said town in the Delhi and Middletown Railroad."

The act provided that if the vote was in the affirmative it should be lawful for the Commissioners to sell the stock and to convey a perfect title thereto. Under this act a meeting was held upon June 6, 1874, and the town voted to retain the stock (fol. 60). In 1875, the town procured another act to be passed (L. 1875, Chap. 153), entitled "An Act relating to stock of the Delhi and Middletown Railroad Company, owned by the Town of Andes, Delaware County." This act provided: "It shall be lawful for the voters of the Town of Andes, Delaware County, at a special town meeting, to be called and held in accordance with law, to vote upon the question of selling the stock in the Delbi and Middletown Railroad Company belonging to said town, and held by the Commissioners of said town. * * * If a majority of the ballots received thereat shall contain the words 'in favor of selling Delhi and Middle-

town Railroad stock,' then it shall be lawful for the Commissioners of said town having said stock in charge to sell the same and to execute all papers necessary to convey a perfect title to the same." Under this act a town meeting was held in which the voters of the town voted to sell the stock (fol. 61).

These acts of the Legislature and the action of the town under them constitute a special estoppel. The Legislature had power to declare these bonds valid. The acts of 1874 and 1875 had the force of curative statutes. It is settled law that a defect in the execution of a power conferred by the Legislature is cured by a subsequent statute recognizing the existence of the power. By these statutes the public was informed that the Town of Andes owned stock in the railroad, and that the Commissioners were officers of the town, and as such officers were empowered by the Legislature to convey a perfect title to the stock. This was a legislative recognition of the validity of the bonding proceedings and directly assumed and ratified the validity of the bonds with which the stock was purchased ; for, if these bonds were not recognized as valid, then there were no Commissioners nor any valid title to the stock, nor any power to convey a perfect title thereto.

Cf. Morawetz, Private Corporation, Sec. 11.

IV. The full and abundant recognition of the validity of these bonds by the Town of Andes, evidenced not only by its receipt and retention of the stock in the railroad, but also by the payment of interest upon the bonds for nearly ten years and by the payment of a portion of the principal, is a complete estoppel.

Rich vs. Town of Mentz, 18 Fed. R., 52.
Whiting vs. Town of Potter, 18 Bl., 165.
Oswego Bk. vs. Wolcott, 19 Bl., 370.
Calhoun vs. D. & M. R. R. Co., 28 Hun, 379, 398–402.
Dillon, Municipal Corporations, Vol. I., p. 548.

Coloma vs. Eaves, 92 U. S., 484.
Moultrie Co. vs. Bk., 92 U. S., 631.
Marcy vs. Oswego, 92 U. S., 637.
Douglass Co. vs. Bolles, 94 U. S., 104.
Weyawega vs. Ayling, 99 U. S., 112.
Supervisors vs. Galbraith, 99 U. S., 212.
Brooklyn vs. Ins. Co., 99 U. S., 362.
Wilson vs. Salmanca, 99 U. S., 499.
Orleans vs. Platt, 99 U. S., 676.
Lyons vs. Munson, 99 U. S., 684.
Douglass Co. vs. Pike, 101 U. S., 677.
Supervisors vs. Schenck, 5 Wall., 772.
Marsh vs. Fulton Co., 10 Wall., 676.

The principle of these decisions directly applies to this case. They do not affirm that the act of a municipal corporation expressly, forbidden or *ultra vires*, will be upheld on the ground of acquiescence; but that which it may legally and lawfully do when a majority of its taxpayers, representing a majority of its property, consent, and which purports to have been thus done will be upheld, when long acquiesced in, in favor of parties who have in good faith parted with their money on the assurances given them by the past action of the municipality.

Point V.

The bonds are valid, even under the strictest and most technical construction of the bonding acts.

1. The certificate of incorporation of the railroad company exactly follows and complies with the requirements of the statute.

N. Y. Laws 1850, Ch. 140, SS. 1–4 (Birdseye's Ed. R. S., p. 2401).

The first section of this act requires that the articles

of association shall state "the places from and to which the road is to be constructed or maintained and operated."

The fourth section requires an affidavit of at least three directors "that the amount of stock required by this section [$10,000 per mile] has been in good faith subscribed, and ten per cent. paid in cash thereon as aforesaid, and that it is intended in good faith to construct or to maintain and operate the road."

2. It is objected that the certificate of incorporation was defective in that certain of the subscriptions were conditional. It appears that two shares were subscribed for on condition that the road should be located as it was afterwards actually located. This fact is immaterial. The affidavit shows a compliance with the statute. Even under the decisions of the State of New York, such criticisms are untenable.

Beattys vs. Town of Solon, 64 Hun, 120.
Farnham vs. Benedict, 107 N. Y., 159.

The opinion of the Court of Appeals in the case last cited fully recognizes the fact that the bonds cannot be attacked upon account of defects in the articles of association, and the Court held that this fact gave the town a cause of action against the fraudulent incorporators.

"Whether the corporation had a legal existence or not, when the subscription was made, is a question that cannot be raised in a collateral proceeding."

Dallas Co. vs. Huidekoper, 25 U. S. R. (L. C. P. Co. Ed.), p. 974.
Macon Co. vs. Shores, 97 U. S., 276.

3. The petition upon which the County Judge acted was not conditional; sixteen of the petitions were unconditional. The County Judge had the right to act upon these and upon the return day to include the conditional petitioners if it appeared that the condition had been complied with before the petition was presented.

4. The County Judge also had the right to act upon a conditional petition (People vs. Peck, 4 Lansing, 528).

The cases cited by Judge DANFORTH in Craig vs. The Town of Andes, upon the subject of conditional consents, were all cases of stock subscriptions, except People vs. The Adirondack Company (57 Barb., 656), decided at General Term, and held by the same Court in People vs. Peck, *supra*, to not apply to a case like the present one. The decisions were all decisions made in actions brought on the conditional subscriptions. Down to the time of the decision of the collusive case of Craig vs. The Town of Andes, all the authorities of the Courts of the State of New York upheld the validity, as to third parties, of acts done upon condition, while holding that as between the original parties an action could not be brought on the original subscription. But this is not a case of stock subscription, but is a question whether there is any public policy which prevents a man from saying that he is willing to consent to a railroad upon a particular route. The statute does not prohibit him, but says that he may consent.

5. The objection that the petition does not specify that the railroad company "is a company in this State" is answered by the fact that the petition does so state (*cf.* Calhoun vs. D. & M. R. R. Co., 28 Hun, p. 389).

6. The contention that the notice of hearing is defective is answered by the same opinion at page 391. The notice specifies the office of the County Judge at Delhi, and it is shown that he had there a public office in the Court House thus designated by the Board of Supervisors of the county.

7. The County Judge of Delaware County swears positively that he was not a stockholder in the railroad

company. Even if he had been he would not have been disqualified to entertain the proceedings.

Matter of Ryers, 72 N. Y., 1.
People vs. City of Kingston, 101 N. Y., 82, 95.
Stuart vs. Mechanics' and Farmers' Bank, 19 Johnson's R. (N. Y.), 495.

The judgment of the Circuit Court should be affirmed.

JOHN B. GLEASON,
Counsel for the Defendant in Error,
155 Broadway,
New York City.

1 J 5 - 312

United States Supreme Court.

THE TOWN OF ANDES,
Plaintiff in Error,

AGAINST

DUDLEY P. ELY,
Defendant in Error.

No. 295.

STATE OF NEW YORK,
City and County of New York, } ss.:

JOHN B. GLEASON, being duly sworn, says, I am the counsel for defendant in error, Dudley P. Ely.

The summons in the action in the State Court was not served on Dudley P. Ely personally and he did not appear in that action. The only attempted service upon him was under an *ex parte* order for publishing the summons.

In June, 1889, Mr. Ely, who is the president of the National Bank at South Norwalk, Connecticut, and a person of abundant financial responsibility, had authorized me to buy a quantity of coupons from bonds of the Town of Andes for his account. He already owned a number of bonds which he bought in 1882. At that time the status of the litigation in the United States Courts was as follows:

The Circuit Court had held that the bonds were valid. In 1884 Albert Slauson recovered a judg-

ment against the Town of Andes, which was appealed to this Court. The appeal was argued in April, 1889, by Hon. Isaac H. Maynard in behalf of the Town of Andes and by me in behalf of Mr. Slauson. Upon the argument Mr. Justice Gray suggested that by reason of a clause which had been inserted, at the request of the attorneys for the town, in the order for trial before the Court, this Court had not jurisdiction to review the exceptions. I stated to the Court that I made no such claim and requested the Court to decide the appeal upon the merits if it saw any way to do so, but subsequently the Court, in the decision reported 130 U. S., at page 435, decided that it could not review the case upon the exceptions and affirmed the judgment. Subsequently I recovered another judgment against the town and upon the argument before Judge Coxe, counsel for the town complained earnestly that the town ought to be allowed to review the question of the validity of the bonds in this Court. I was at Saratoga in June, 1889, for the arguments of an action brought by taxpayers of the town for a cancellation of the bonds (Calhoun *et al. vs.* Millard *et al.*, Reported 121 N. Y., p. 69). Whilst there I stated to I. H. Maynard and C. M. Shaw, the attorneys for the town, that I was expecting to bring another action in the Circuit Court. They said that the people of the town were very much dissatisfied because they could not obtain a decision upon the merits in this Court and that they wished that I would bring the action for a sum over five thousand dollars. And as an inducement in that direction they stated that they thought that the town would be willing to stipulate to litigate in such an action only the question of the validity of the bonds and to do everything in its power to arrive at a speedy decision. Subsequently the stipulation contained in the motion papers was forwarded to me on the part of the town, and it was stated to me that the town board, at a meeting called for that purpose, in consultation with Judge Maynard, had

voted to make the offer contained in the stipulation. Prior to the making of this paper, I had had no consultation or communication with regard to it with James Taylor, than the Supervisor of the town, nor with any town officer with regard thereto, and the making thereof was a thing volunteered by the town.

Nowhere in the moving papers is there any allegation of any knowledge that these coupons were not actually sold to Mr. Ely, but James F. Scott, the Supervisor of the town, alleges upon his information and belief that there never was an actual sale. This allegation I directly and positively deny. I did not believe that anybody by any proposition could authorize me to bring, as an attorney and counsellor of this Court, any action which was not based upon the actual ownership of the subject matter of the controversy. I informed Mr. Ely that the town had made the proposition, and that, in view of the fact that the town would probably continue to litigate until the Supreme Court should decide the question, and that they proposed to unite in a motion to advance the case upon the calendar, I hoped that he would buy all the coupons that he could get. But with reference to the term of the sales to him, I stated to him that he must actually buy the coupons. I also said that, no matter what the Town of Andes now proposed, it was not to be expected that they would abide by it longer than it seemed for their interest, and that if in any action which he should bring the town should defend against his title to the coupons, I would not dispute but that they could interpose such a defense. And I know that these coupons were all actually sold and all actually delivered to Mr. Ely.

In the action in the State Court each defendant answering has sworn positively that their coupons were actually sold.

With reference to the two letters to Alice A. Newkirk in the moving papers, I had been requested previously to sell these bonds and coupons, and in

that connection and believing the occasion advantageous to Miss Newkirk I wrote to her about them. The coupons were delivered to me and were actually sold to Mr. Ely. She subsequently forwarded the bonds to me, but some time after the judgment she wrote to me that she had made a compromise with the Town of Andes and requested me to return the bonds and coupons. I returned the bonds, stating that of course I could not return the coupons which had been sold and delivered to Mr. Ely. Miss Newkirk is a resident of the Town of Andes.

As to the conduct of the action in the Circuit Court, as matter of fact the Town of Andes did not abide by its proposition, but interposed an answer putting in issue every allegation of the complaint, except the allegation that the town was a municipal corporation of the State of New York. I prepared for the trial of the action with reference to the necessity of being ready to prove the full details of the sales to Mr. Ely, and was ready at the trial to prove all the details if required.

I believe the fact to be that on the part of the town at the time of interposing their answer it was believed that they might successfully dispute the title of Mr. Ely to a large part of these coupons, but if they attempted to do this there was the danger that I might withdraw all coupons over which there was any question and take judgment for less than $5,000, in which case they could not appeal. I do not see that I could reasonably be asked to try the defendant's case for it in the court below. I think the supervisor of the town acted with propriety and within his strict legal right in offering to forego technical defenses in order to ensure the certainty of an appeal. However this may be, I could not claim that here was a contract and ask to have the inconsistent defenses stricken out, but was compelled to meet the issue as made.

The coupons in question were sold to Mr. Ely at different times and upon different terms. If the defendant, under its answer, had seen fit to go into

details of the sales, and if any question had arisen as to any particular transaction, I would have considered on the part of the plaintiff whether I should not withdraw these coupons. My careful and deliberate opinion is that the defendant could not have thrown a shadow upon the plaintiff's title in the court below, but I respectfully submit that if the defendant intended to attempt that task it should have done so in the court below under the defense in its answer, and that it is absurd for the Town of Andes to ask this Court to stay its procedure until the town shall litigate in another forum a question already tried and decided in this action.

In the action in the State Court the trial Court dismissed the complaint upon the opinion of the plaintiff's counsel. The Town of Andes appealed from that decision and the decision was affirmed at the General Term. The Town of Andes appealed the case to the Court of Appeals only a few days ago. The appeal is not upon the calendar of the Court of Appeals, and a new calendar will not be made up until next year.

J. B. GLEASON.

Sworn to before me this }
8th day of April, 1895. }

CHAS. J. MCDERMOND,
Notary Public,
Kings County.
Certificate filed in New York County.

III.—The slightest inspection of the complaint in the action in the State Court will show that the courts of the State of New York have correctly decided that the action in the State Court could not be maintained. The complaint in that action alleges that the town did not interpose the defense of non-ownership of the coupons because it relied upon a stipulation which contained the following recital:

"Whereas, John B. Gleason, as attorney for persons claiming to be bondholders of the Town of Andes, intends to bring an action or actions in the United States Circuit Court, and the Town of Andes desires that if such action is brought so as to allow the town the right of appeal to the United States Supreme Court in the event of a decision unfavorable to it in the Circuit Court, and the said Gleason has intimated a willingness to consolidate as far as practicable the alleged causes of action against the town so as to allow an appeal to the United States Supreme Court and a decision upon their merits, provided it is not to be claimed by the Town of Andes in so doing a collusive case has been made."

The complaint also alleges that this stipulation was entirely unauthorized and void. Certainly there was nothing in this recital which was untrue, and it amounted to a notice to the Town of Andes that if it interposed any technical defense the plaintiff might discontinue his action. The complaint also alleges that the Town of Andes relied upon the statement, contained in the complaint, alleging the ownership of these coupons by the plaintiff. The plaintiff cannot maintain an action and set aside a judgment upon an allegation that it relied upon the complaint in a former action. The whole substance of the complaint is that there was an unwillingness to bring an action for over five thousand dollars, if the defense of collusive transfer should be interposed, and that with knowledge of that fact and for the sake

of obtaining the right of an appeal upon the merits, the Town of Andes did not interpose the defense of non-ownership.

No allegation of fraud can be predicated upon such a state of facts. It is therefore obvious that the trial Court decided correctly in dismissing the complaint in the State Court, upon the face of it.

The affidavit presented in opposition to the motion and the record upon the appeal in this Court conclusively show the bad faith of the Town of Andes in bringing the action in the State Court. Instead of its being true, as alleged in the complaint in the action in the State Court that the town did not interpose the defense of non-ownership, it will be seen by an inspection of the answer that it did actually interpose this defense, and that the question was litigated in the Court below. The action in the State Court and this motion for appeal are, as I believe, part of a proceeding on the part of the town to force the bondholders to accept a percentage of their claim.

The conduct of the town with reference to these bonds is such as to preclude it from asking any favors from any Court. It appears from the record in this action that the bonds were all sold to *bona fide* purchasers, who paid full value for them, and for a period of about ten years the town paid the interest upon the bonds and retired a portion of the principal, and recognized their validity in many ways.

In this particular I call the attention of the Court to the decision of the Court of Appeals of the State of New York in Calhoun against Millard, 121 N. Y., pp. 84–85. This was an action for the cancellation of these bonds. In this case the Court of Appeals commented upon the conduct of the Town of Andes, and, among other things, said:

"The denial of relief in this case may result practically in the enforcement of the bonds in question. But in contrasting the relative conduct and